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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-893

IRVING SULMEYER and ARNOLD L. KUPETZ,
Co-Trustees in Bankrupty for
Bubble-Up Corporation,
Petitioners,

vs.

THE COCA COLA COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Fifth Circuit

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Statutes involved	2
Questions presented for review	2
Statement of the case	3
A. The nature of the case	3
B. Material facts	4
Reasons for granting the writ	11
A. Conflict between the circuits and with the decisions of this court—agreements to divide sales markets	11
B. The refusal of the circuit court to decide the territorial questions	12
C. The propriety of instruction and argument on treble damages—an important federal question	12
Conclusion	14

Table of Authorities Cited

Cases	Pages
Addyston Pipe and Steel Company v. United States, 85 F. 271 (1898), aff'd 175 U.S. 211 (1899)	11
Bordonaro Bros. Theaters v. Paramount Pictures, 203 F.2d 676 (2d Cir. 1953)	13
Noble v. McClatchy Newspapers, ... F.2d ....., November 14, 1975	11
Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240 (5th Cir. 1974)	13
Semke v. Enid Automobile Dealers Ass'n, 456 F.2d 1361 (10 Cir. 1972)	13
Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)	11
United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967)	11
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	11

Rules

Rules of Civil Procedure:	
Rules 50(a) and (b)	2

Statutes

Sherman Act:	
Section 1 (15 U.S.C. §1)	2, 4
Section 2 (15 U.S.C. §2)	2, 3, 4
Clayton Act:	
Section 4 (15 U.S.C. §15)	3
Section 16 (15 U.S.C. §26)	3
28 U.S.C. §1254(1)	2

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Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Fifth Circuit

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered on July 11, 1975, which affirmed the Order of the United States District Court for the Northern District of Georgia, Atlanta Division, denying motions for judgment notwithstanding the verdict and for a new trial.

OPINIONS BELOW

The opinion of the Court of Appeals review of which is sought is reported at 515 F.2d 835 and is set forth as Appendix A to this petition.

The unreported opinion and order of the District Court is set forth as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 11, 1975. A timely petition for rehearing was filed on July 25, 1975 and denied on September 24, 1975 [Appendix C to this petition]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1, 2] and Rules 50 (a) and (b) of the Federal Rules of Civil Procedure. The statutes and rules are set forth as Appendix D to this petition.

QUESTIONS PRESENTED FOR REVIEW

1. Are agreements to divide markets in the soft drink industry immunized from the antitrust laws by reason of their historical use?
2. Are certain practices in the soft drink industry, including tying arrangements and group boycotts, immunized from the antitrust laws on the ground that they are necessary because of existing agreements to divide markets?
3. Are the Coca Cola bottlers, the dominant bottlers in the soft drink industry, sufficiently distinct to constitute a relevant customer market under Section 2 of the Sherman Act?
4. May a Court of Appeals constitutionally refuse to decide an important question of federal law which was erroneously decided by the trial court on motions for directed verdict and judgment n.o.v.
5. Is an erroneous instruction on trebling coupled with an erroneous argument by defense counsel that: "So, instead of asking for $20,000,000 he's asking for $60,000,000 . . . it goes to the vultures and jackals . . . what he is asking you to do is to make a multi-millionaire out of the vultures and the jackals . . . Did the vultures and the jackals buy a $60,000,000 dollar bonanza . . . as soon as I began to talk in the plaintiff's terms about $6,000,000 here and $9,000,000 there and $25,000,000 there and $60,000,000 there, I somehow feel as though I have been edged over into a territory in which I do not want to stand at all. The evidence does not support a *verdict* for the plaintiff", incapable, *as a matter of law,* of prejudicing an antitrust plaintiff?

STATEMENT OF THE CASE

A. The Nature of The Case

This is a private antitrust suit brought by petitioners against respondent under Sections 4 and 16 of the Clayton Act [15 U.S.C. §§ 15, 26] to secure damages and

injunctive relief for violations of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1, 2].

B. Material Facts

Until 1970, Bubble Up Corporation was an Illinois corporation engaged in business as a manufacturer of a lemon-lime soft drink syrup and concentrate. In connection with that business it licensed persons to bottle, distribute and sell its lemon-lime syrup and concentrate under the registered trademark BUBBLE UP throughout the United States.

The Coca Cola Company is a Delaware corporation which is, *inter alia*, engaged in the business of manufacturing and bottling soft drink syrups and concentrates under its registered trademarks, including COCA COLA, SPRITE, FANTA, and TAB, throughout the world. It also licenses others to bottle soft drink syrups and concentrates under its trademarks.

From 1886 until 1892 Coca Cola syrup was sold throughout the United States directly to soda fountains without any restriction on the type of container in which or customer to whom the syrup could be resold.

In 1892 the Coca Cola Company was formed as a corporation and in that year the Company entered into an agreement with the firm of Seth W. Fowle & Sons to divide the United States territory in which each would sell Coca Cola syrup. This was the first division of territory. There was still no restriction on the type of container in which the syrup could be resold. Some purchasers mixed the syrup with soda water and ice for consumption at the drug store fountain; some bottled Coca

Cola syrup with soda water to drink at picnics and at the ball park.

In 1899 the Coca Cola Company, in addition to selling to soda fountains, contracted to sell its syrup to two Chattanooga lawyers, B. F. Thomas and J. B. Whitehead, on the express conditions that, absent its written consent, the syrup could be resold only in the United States and only as a bottled drink and would not be resold in competition with Coca Cola Company sales to soda fountains, or, as a bottled drink, or otherwise, in the Fowle & Sons territory. This was the second division of territory and the first restriction on the type of container in which Coca Cola syrup could be resold.

Thomas and Whitehead began bottling Coca Cola in December, 1899. In 1900 they agreed between themselves to divide the territory in which they would sell the bottled Coca Cola drink. Thomas took 17 central and eastern states plus California, Oregon and Washington; Whitehead took the rest of the United States.

Between 1900 and 1972 Thomas and Whitehead and their various corporate successors acted together and agreed with over 1000 independent bottlers, including the Coca Cola Company in its capacity as a bottler, to divide, sub-divide and redivide the geographic area in which each bottler would, to the exclusion of all other purchasers of Coca Cola syrup, be allowed to make sales of bottled Coca Cola.

These agreements between bottlers to divide territory and customers were continuously participated in and enforced by the Coca Cola Company at the insistence and for the benefit of the bottlers, and for itself in its ca-

pacity as a bottler, from 1900 to and including the time of trial.

By 1934, the Coca Cola territories had little, if any, relationship with the geographic configuration of the market bottlers could economically serve. The advent of freeways, supermarket warehousing, improvements in bottling machinery, radio and, especially, television had each acted to significantly expand the area in which a bottler could, absent an agreement to divide territory, profitably sell a bottled soft drink.

By 1935 Coca Cola bottlers were combining, with the knowledge of the Coca Cola Company, to split the bottling of certain sized bottles of Coca Cola among their respective territorial operations on a regional basis.

By 1939, groups of Coca Cola bottlers were, because of their agreements prohibiting sales of Coca Cola outside their respective territories, combining to pool their money for purposes of advertising Coca Cola on television and were engaged in "cross bottling" or "contract bottling" with other Coca Cola bottlers for various Coca Cola Company soft drinks.

The Coca Cola bottlers are a unique and distinct system of soft drink distribution within the United States. They have divided territory between themselves in such a way as to create irreconcilable conflicts in distribution between themselves and other soft drink bottlers, including the Pepsi and Seven Up bottler systems. They are dealt with by persons in the industry, including manufacturers of soft drink syrups and concentrates, soft drink equipment and supply companies and other bottlers as a separate market. The Coca Cola bottlers were identified as being engaged in a "difference business" than other bottlers and were identified historically as being the number one target for new soft drink brands because of their status as "bastions of financial strength" and their overwhelming dominance in the soft drink industry. These bottlers act together on an exclusive basis to spend hundreds of millions of dollars in advertising and promoting their common soft drink products and engage in bottling each other's soft drink products to the exclusion of other products. Coca Cola bottlers generally label their soft drink bottles as their property making those bottles unfit for use by competing bottler systems.

In the late 1950's the Coca Cola bottlers demanded a lemon-lime drink. The Coca Cola Company did not supply that demand. Consequently, Bubble Up filled the void so that, by 1960, it had licensed its drink to 350 to 400 Coca Cola bottlers. By 1960 the Coca Cola Company viewed Bubble Up as a threat to its control of the Coca Cola bottler distribution system and as "shaking the confidence of bottlers in Coca Cola."

In response to Bubble Up's threat, the Coca Cola Company began bottling and selling, and exclusively licensing Coca Cola bottlers to bottle and sell, lemon-lime soft drink syrup and concentrate under the trademark Sprite. In introducing Sprite in 1961 the Coca Cola Company relied upon the territorial restrictions and divisions between bottlers which had regulated the sale of bottled Coca Cola since 1892. Specifically, in each intance, the Sprite bottling contract was by agreement with the bottler fixed to and made to exactly conform with the ancient Coca Cola bottling territories.

Since, according to the Coca Cola Company, the introduction of Sprite required the heavy use of television advertising and since, as noted by the trial court, "The television signal area usually extended *beyond* any one bottler's territory", any relationship between the Sprite territory and the market in which a bottler could profitably make Sprite sales was absent at the outset.

Even though the bottlers continued to adhere to the agreements between themselves to divide sales territories, and to enforce those agreements through the Coca Cola Company, they joined on a regional basis in what the Coca Cola Company called "natural marketing areas" to advertise and promote both Coca Cola and Sprite as a group. Some advertising and promotional cooperatives were initiated by the bottlers themselves. With respect to Sprite, however, all the group bottler programs were formulated and presented by the Coca Cola Company to bottlers for their acceptance at group bottler meetings.

The Coca Cola Company, with its treasury, vast sales force and trade relations, determined that it would be supplying Sprite to 85% of the Coca Cola bottler market within five years. In fact, it achieved 87%. In the first three years, from 1961 to 1964, Bubble Up lost over 300 Coca Cola bottlers. During this time the Coca Cola Company kept a running scorecard showing the number of Coca Cola bottlers dropping Bubble Up and further acted to destroy Bubble Up bottlers to get them "out of the trade."

The introduction of Sprite, and each Sprite advertising and marketing program from 1961 until 1972, was firmly rooted in, predicated upon and made an operational part

of the agreements between bottlers to divide markets. Each Sprite program specifically invited the Coca Cola bottlers to maintain their "sacred" agreements not to compete while simultaneously acting together and "in concert" to advertise and promote the product on the consumer level.

The various multimillion dollar programs initiated by the Coca Cola Company for Sprite and accepted by the Coca Cola bottlers were, among others:

(1) *The Investment Market Program,* pursuant to which the Coca Cola Company offered Coca Cola bottlers large amounts of extra advertising credits on the express condition that enough bottlers to cover at least 80% of any television signal area combine to take on Sprite. This program was initiated with full knowledge that bottlers who accepted it would *necessarily* drop Bubble Up;

(2) *The Cash Bonus Program,* pursuant to which the Coca Cola Company paid specified amounts of cash to Coca Cola bottlers on condition that they bottle Sprite;

(3) *The Interchange Programs,* pursuant to which the Coca Cola Company allowed Coca Cola bottlers to use substantial amounts of Coca Cola, Tab and Fanta advertising credits and money to purchase Sprite bottles and to advertise Sprite;

(4) *The Co-operative Advertising Programs,* pursuant to which the Coca Cola Company offered substantial extra credits and monies to Coca Cola bottlers on the express condition that the bottlers combine to advertise Sprite;

(5) *The Equipment Lending Program,* pursuant to which the Coca Cola Company made available 30 million dollars worth of soft drink dispensing equipment on the condition that the bottlers dispense Coca Cola Company soft drinks, and;

(6) *The 100% Program,* pursuant to which the Coca Cola Company offered to pay for all the introductory and consumer advertising for a Coca Cola bottler for 2 years if he introduced Sprite. (This program could amount to as much as $2,000,000 for one major bottler. The program was initiated in 1965 as a "last ditch effort" to convert the remaining 15% of Coca Cola bottlers to Sprite).

Bubble Up claimed, among other things, that it was entitled to a directed verdict on the issue of Coca Cola's unlawful market divisions, reserving the issues of causation and damages for the jury. The trial court "temporarily" overruled the motion to "allow evidence to be presented" by the Coca Cola Company and "if it became evident later, I could go ahead and take that action." (Vol. 21, p. 23). The issue of Coca Cola's liability on the territorial agreements was again raised by Bubble Up on motion for judgment notwithstanding verdict. The trial court, in denying the motion, began by saying that "A motion for judgment notwithstanding the verdict in effect renews an earlier motion for directed verdict. . . ." (Appendix A, p. 11). The trial court then agreed that the territorial restrictions, whether construed as horizontal or vertical, were *per se* unlawful; but denied Bubble Up's motion on this issue on the ground that the jury found that Bubble Up had not been *injured* "as a direct result of the *violations* committed by the defendants."

REASONS FOR GRANTING THE WRIT

A. Conflict Between the Circuits and with the Decisions of This Court—Agreements to Divide Sales Markets.

The decision of the Court of Appeals leaves standing the trial court's ruling that agreements between competitors to divide markets in the soft drink industry are not unlawful *per se* and is in direct conflict with the decisions of this Court in *Addyston Pipe and Steel Company v. United States,* 85 F. 271 (1898), *aff'd.* 175 U.S. 211 (1899); *Timken Roller Bearing Co. v. United States,* 341 U.S. 593 (1951); *United States v. Arnold Schwinn & Co.,* 388 U.S. 365 (1967) and *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972).

The decision of the court below, affirming the trial court's denial of Bubble Up's motion for a directed verdict is also in direct conflict with the recent decision of the United States Court of Appeals for the Ninth Circuit in *Noble v. McClatchy Newspapers,* ..... F.2d ....., November 14, 1975, which held agreements to divide markets unlawful *per se.*

The *only* ground relied upon by the trial court in sanctioning the agreements to divide markets was that the *jury* found that Bubble Up had not been *injured* "as a direct result of the *violations* committed by the defendant." Petitioners submit that the interposition of such a purported "ground" manifestly begs the question as to whether the horizontal and vertical agreements violate the Sherman Act as a matter of *law,* and in such a departure from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

B. The Refusal of the Circuit Court to Decide the Territorial Questions.

The Court of Appeals did not rule upon or even mention the proven *horizontal* agreements to divide territory upon which the trial court had expressly ruled in denying Bubble Up's motion for judgment n.o.v.

The agreements to divide markets were raised in the pre-trial statement and made a part of the final pre-trial order. Both parties offered substantial evidence, admitted by the Court, respecting the agreements to divide territories and the agreements were the subject of extensive oral argument and briefing by the parties prior to the close of plaintiff's case. The agreements were specifically mentioned in Bubble Up's motion for a directed verdict. Further, *both* the horizontal *and* vertical territorial restrictions were *actually considered* and *ruled upon* by the trial court *after* it had correctly observed that "a motion for judgment notwithstanding the verdict in effect *renews* an earlier motion for directed verdict" [emphasis added].

The refusal of the Court of Appeals to consider or rule upon *either* the horizontal or the vertical territorial restrictions effectively denied Bubble Up its right of appeal and constitutes a gross and intolerable departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

C. The Propriety of Instruction and Argument on Treble Damages—an Important Federal Question.

The Court of Appeals held as a *matter of law* that an antitrust plaintiff could not be prejudiced by instruction

and argument on treble damages. This question has not been but should be settled by the Court. The circuit courts are in conflict on the question of whether an instruction on trebling is error, compare *Semke v. Enid Automobile Dealers Ass'n,* 456 F.2d 1361 (10 Cir. 1972) with *Bordonaro Bros. Theaters v. Paramount Pictures,* 203 F.2d 676 (2d Cir. 1953).

The decision below is the only one known to petitioners that holds instruction and argument on treble damages incapable, as a matter of *law,* of prejudicing an antitrust plaintiff. The decision of the trial court, affirmed by the Court of Appeals, to allow defendant to put the matter of trebling before the jury resulted in a defense argument against the return of a *verdict* because Bubble Up was seeking a "60 million dollar bonanza." The trial court did not even consider whether this argument prejudiced plaintiff "since the jury did not reach the question of *damages*". The Court of Appeals held the instruction and argument to be harmless because the jury had found no *violation,* in direct conflict with its holding in *Pollock & Riley, Inc. v. Pearl Brewing Co.,* 498 F.2d 1240 (5th Cir. 1974) that a trebling instruction *alone* constituted error because:

> "The justifiable fear of antitrust plaintiffs is that the juries will adjust the damage award downward *or find no liability,* therefore thwarting Congress's purpose . . ." *Id.* at 1242.

This whimsical, *ad hoc* approach to a substantial question of federal law which carries the potential of thwarting the purpose of Congress should be put to a stop.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Fifth Circuit reversed.

Dated, San Francisco, California,
December 22, 1975.

Respectfully submitted,
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(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals,
Fifth Circuit.

No. 73-2231

Irving Sulmeyer and Arnold L. Kupetz,
Co-Trustees in Bankruptcy for Bubble
Up Corporation,
Plaintiffs-Appellants,

vs.

Coca Cola Company,
Defendant-Appellee.

[July 11, 1975.]

Before THORNBERRY, COLEMAN and ROSENN*, Circuit Judges.

THORNBERRY, Circuit Judge:

Irving Sulmeyer and Arnold Kupetz, Co-trustees in Bankruptcy for the Bubble Up Corporation, appeal the trial court's denial of their motion for judgment notwithstanding the verdict in their antitrust suit against the Coca Cola Company.[1] Alternatively, they claim that the

*Of the Third Circuit, sitting by designation.

[1]For convenience, we will refer to the appellants as the Bubble Up Corporation.

trial court erred in denying their motion for a new trial. The trial court's rulings followed an eight week jury trial that ended with a general verdict for Coca Cola Company. We have carefully examined Bubble Up's numerous claims of error, and have concluded that Bubble Up had ample opportunity to develop its antitrust claims in the court below. The trial court properly submitted the case to the jury on instructions satisfactory to Bubble Up, and substantial evidence supports the jury's verdict in Coca Cola's favor. Therefore we affirm the trial court's actions in denying both post-trial motions.

I. BACKGROUND

A. *The Lemon-Lime Soft Drink Market.*

Bubble Up Corporation manufactures a lemon-lime soft drink syrup that it sells to franchised bottlers. They bottle the syrup in accordance with Bubble Up's standards, and deliver the finished product to retailers for distribution to the ultimate consumers. Other soft drink syrup manufacturers market their products in a similar fashion. By the late 1950's, Coca Cola, Pepsi Cola, and Seven Up had effectively achieved nationwide distribution at the consumer level for their soft drinks. Each had done so through a series of franchise agreements with independent bottlers across the nation. Thus each company had franchised a distinct group of independent bottlers, though evidence indicated that some bottlers handled both Coca Cola and Seven Up.[2] Seven Up was the dominant seller

[2]Coca Cola and Pepsi Cola did not franchise the same bottlers. The two cola products directly compete at the consumer level. A bottler with a dual franchise might be hesitant to strongly promote one cola product over the other, with competitive detriment to both

of lemon-lime soft drinks and was Bubble Up's chief competitor at the consumer level.[3]

Bottler profits vary as a direct function of consumer demand. Since substantial nationwide demand for Seven Up had developed, Bubble Up would have been hard pressed to convince a bottler franchised for Seven Up to change to a Bubble Up franchise. The company chose to avoid head to head competition with Seven Up for lemon-lime bottler franchises, and sought to achieve nationwide distribution through franchise agreements with bottlers holding Coca Cola or Pepsi Cola franchises.

In 1960 Bubble Up made a major corporate decision. Dissatisfied with efforts to achieve national distribution using both Coca Cola and Pepsi Cola franchisees, the company decided to seek to franchise Coca Cola bottlers exclusively. At about the same time the Coca Cola Company decided to market its own lemon-lime product—Sprite. In the end Bubble Up's efforts to achieve nationwide distribution through the bottlers franchised for Coke fizzled.

B. *The Coca Cola Company's Entry Into the Lemon-Lime Market.*

Dr. John S. Pemberton formulated the original Coca Cola syrup and extract in 1866 in Columbus, Georgia. He

syrup manufacturers. To the extent that the lemon-lime segment of the soft drink market comprises a separate set of consumers, this conflict is lessened. Non-cola soft drinks and cola products are sufficiently competitive at the consumer level, however, to make dual franchises for Coca Cola and Seven Up relatively rare.

[3]In the late 1950's, Seven Up began to increase its share of the total soft drink market, taking advantage of its ability to satisfy increased consumer demand for lemon-lime soft drinks.

and J. M. Robinson began to distribute the product in Atlanta, Georgia. Pemberton fell ill and died in 1888. Asa G. Candler, a former competitor, acquired all rights to the product by April 1891, and in 1892, transferred those rights to the Coca Cola Company, a newly formed Georgia corporation, in exchange for stock. Originally, the company sold its product to fountain retailers who mixed the syrup with carbonated water at the retail outlet for direct sale to the ultimate consumer. Around 1900 independent bottlers were licensed to mix and bottle the drink, then sell it to retailers. A nationwide system of franchised bottlers developed and that system became the primary channel for distribution of Coca Cola to retail outlets for sale to the consumer.

Through World War II, Coca Cola concentrated exclusively on selling its basic product, Coca Cola syrup, to the franchised bottlers. Then a shift in soft drink demand occurred, with consumers willing to purchase a more varied assortment of soft drinks. The demand shift at the consumer level produced a corresponding shift in bottler demand. Independent bottlers holding Coca Cola franchises began pressuring the Coca Cola Company to market a more varied line of syrups. Lemon-lime flavored soft drinks developed into the second largest line of soft drink flavors with Seven Up holding by far the largest share of that market.[4] A number of products competed for the consumer dollars in that market including Bubble Up,

[4]By 1960 the lemon-lime segment of the soft drink market accounted for 10.5% of total soft drink sales. Seven Up made over 80% of the total lemon-lime drink sales.

Sun Up, Uptown, and 50-50.[5] The development of soft drink lines other than cola drinks coincided with a period of rapid growth and increasing sophistication in vending machines. Bottlers sought additional flavor lines to supply a full range of products at retail vending machine outlets. Coca Cola responded to this consumer and bottler demand in 1958 with the Fanta line of soft drink products. That line included orange, grape, root beer, strawberry, ginger ale, and club soda.

Coca Cola decided to compete very actively in the lemon-lime segment of the soft drink industry in 1960. It opted to enter the market through internal expansion.[6] Coca Cola already had a nationwide system of franchised bottlers for its Coca Cola syrup. Understandably the company looked to those bottlers to handle Sprite. Several factors influenced Coca Cola in this regard. Introduction of Sprite was in some measure a response to already existing Coca Cola franchisee demand. Coca Cola employees had a working relationship with franchised bottlers that could be used to Coke's advantage in introducing Sprite at minimum expense. There would be economies of scale in using the existing field marketing organization to market the new product. And the company did not wish to deal with bottlers handling a competing cola product.

[5]Evidence indicated that other drinks competed in this submarket as well, including citrus drinks (e.g., Squirt), and various ginger ales. However, those products were really minor competitive factors. Collectively these products comprised the "green bottle" market.

[6]Fred W. Dickson's testimony indicated there was some pressure at the time to enter the green bottle market through acquisition of the Bubble Up Corporation. Record Vol. 2 at 52.

The decision to use its already existing distribution system placed Coca Cola on a collision course with Bubble Up—both companies competing to franchise the same group of independent bottlers. From 1961-66, the two companies fought rather fiercely, with Bubble Up the clear loser. Bubble Up contends that the Coca Cola Company did not fight fairly and violated Sections 1 and 2 of the Sherman Act. The jury below disagreed, but Bubble Up seeks to overturn that verdict.

II. BUBBLE UP'S MOTION FOR JUDGMENT N.O.V.

Bubble Up moved in the trial court for judgment n.o.v. on its Section 1 and 2 claims. The trial judge denied the motion, rejecting each claim that Bubble Up raised. Here Bubble Up seeks reversal, but fights an uphill battle. Generally a motion for directed verdict or judgment n.o.v. should be granted only in two situations: "First, where there is a complete absence of pleading or proof on an issue or issues material to the cause of action or defense. . . . Second, where there are no controverted issues of fact upon which reasonable men could differ." 5A Moore's Federal Practice ¶ 50.02[1] (2 ed. 1974). *Accord* Alman Bros. Farms & Feed Mill, Inc. v. Diamond Lab., Inc., 437 F.2d 1295 (5th Cir. 1971). In passing on the motion, the trial court must view the evidence in the light most favorable to the party opposing it, giving that party the benefit of all reasonable inferences in its favor. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969). The standard of review at the appellate level is the same. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2524 (1971).

A. *Bubble Up's Section 1 Claims*

Bubble Up argues that it was entitled to a directed verdict on its Section 1 claims because it conclusively proved various *per se* violations.[7] Appellants challenged a number of marketing practices the Coca Cola Company employed in connection with Sprite's introduction in the early 1960's claiming they constituted tying arrangements or group boycotts—both *per se* violations of the Sherman Act.[8] The trial court denied Bubble Up's motions for a directed verdict and judgment n.o.v. on those claims. It did, however, instruct the jury as to boycotts and tying arrangements, but the jury's verdict rejected Bubble Up's Section 1 claims. We find the district court properly denied Bubble Up's motions as the evidence does not conclusively demonstrate any Section 1 violations.

1. *The Investment Market Program:*

Bubble Up directs the major thrust of its Section 1 attack against the Investment Market Program Coca Cola employed from 1961 to 1963. We examine this program in some detail as our disposition of the Section 1 arguments

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[7] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U.S.C. § 1.

[8] Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969) (tying arrangements); United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966) (group boycotts).

here helps answer Bubble Up's attack on various other Coca Cola Company programs.[9]

To successfully market Sprite nationwide, the Coca Cola Company had to do two things: (1) stimulate sufficient consumer demand to make production economical; and (2) develop an effective delivery system. Coke already had a nationwide distribution system for its primary product, Coca Cola. It decided to look to the network of Coca Cola franchised bottlers to establish a nationwide distribution system for Sprite. To stimulate consumer demand for the new product, Coke developed an advertising program that made extensive use of television.

During the late 1950's television replaced radio as the dominant advertising medium. Though extremely effective, it was also extremely expensive.[10] The Coca Cola Company commissioned the McCann-Erickson Advertising Agency of New York City to develop a comprehensive

[9]The Sherman Act's statute of limitations apparently bars Bubble Up's Section 1 challenge to the Investment Market Program. 15 U.S.C. § 15b provides in pertinent part: "Any action to enforce any cause of action under sections 15 and 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued." The Coca Cola Company discontinued the IMP in October 1963, and Bubble Up did not file its complaint until January 2, 1968. Bubble Up seeks to avoid the statute of limitations bar by claiming that Coca Cola engaged in a continuing course of exclusionary conduct. We doubt the validity of that approach here. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). However, we reach the merits of Bubble Up's challenge to the IMP because of its relevance to the intent issues in the Section 2 charge.

[10]*See* Note, Advertising and Shared Monopoly in Consumer Goods, 9 Colum. J. Law & Soc. Prob. 241, 253-55 (1973).

advertising program for Sprite using the new medium. Through a computer study the agency determined that an advertisement broadcast over 197 selected television stations would reach the home TV sets of most of the nation's soft drink consumers. In formulating its proposal, McCann-Erickson divided the country into 197 television marketing areas, geographically defined by the reach of the 197 television signals. Not surprisingly, the geographical territory served by the individual bottlers Coke sought to franchise for Sprite did not correspond to the 197 television marketing areas.[11]

The Sprite Investment Market Program (IMP) sought to utilize the 197 television marketing areas to stimulate demand through an effective and efficient advertising program. Under this program, when Sprite became available to 80% of the consumers in a television marketing area, the company would spend twenty cents on television advertising for every Sprite syrup gallon sold to area bottlers over a three year period. That expenditure supplemented a twenty cent per gallon advertising allowance

[11]Bubble Up asserts that the bottler territories did not correspond to the television market areas because of vertical territorial restrictions. Therefore it claims the IMP is an illegal product of those restrictions. Yet Bubble Up did not specifically make this argument at the trial, nor did it request jury instructions on this theory. See Section II.A.2., *infra*.

The trial evidence on the point is sketchy. Bottler territorial limitations are a function of factors like plant capacity, delivery truck range, available labor force, etc. The designated television marketing areas for advertising were a function of the power of the area TV transmitter. It seems doubtful that bottler territorial limitations had any impact on the advertising program for Sprite. Certainly the trial evidence on the point is not conclusive.

that each individual bottler received under the standard Sprite franchise agreement.[12]

The program contemplated substantial increases in consumer demand for Sprite in its second and third years. The company obligated itself to spend forty cents per gallon over the standard contract allowance during the first year, and an extra twenty cents per gallon in the second. Under the IMP the company would expend the extra twenty cents in the third year on gallonage in excess of first year purchases.

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[12]The price term of the standard Sprite franchise agreement read as follows:

	Price of Concentrate	Price of Syrup
Sprite	.....per unit *	.....per gallon *

*The above prices include an advertising allowance of (1) five cents (5¢) per gallon of syrup, or equivalent gallon of concentrate, which, however, can only be spent for point-of-sale material approved by Fanta Beverage Company and (2) an additional sum of twenty cents (20¢) per gallon of syrup, or equivalent gallon of concentrate, purchased by BOTTLER under this agreement shall be spent, one-half (½) of said amount on advertising or promotions mutually agreed upon by BOTTLER and COMPANY, and one-half (½) of said amount in such manner and form as Fanta Beverage Company deems desirable.

Additionally the contract obligated the bottler "To vigorously promote the sale of the Beverage [Sprite] through the preparation or formulation of sales, advertising and promotional plans and to spend reasonable sums therefor." Thus in performance of his obligation to vigorously promote Sprite through advertising, the franchisee could apply five cents of the purchase price of a gallon of Sprite syrup or concentrate equivalent to purchase point of sale advertising material. An additional twenty cents per gallon was spent for other advertising or promotions.

Under the contract provision the bottler had partial control over the expenditure of one half of the twenty cent allowance. Trial testimony indicated however that in practice the Coca Cola Company exercised complete control over the entire contract advertising allowance during the existence of the IMP.

> Q Now, the advertising, of course, this is advertising that Coca-Cola spends to advertise the product?
>
> Coca-Cola doesn't give the money over to the bottler, right?
>
> A No.

Testimony of Thomas C. Law, Record Vol. 22 at 119.

Coke based its initial outlay in a given marketing area on the total estimated first year gallon purchases of that area's Sprite bottlers. If Coca Cola's first year estimate was 30,000 gallons, the company would spend a total of $18,000 to advertise Sprite over that area's television station. Of the total, $12,000 represent advertising purchased under the IMP, while the twenty cents per gallon contract allowance would account for the remaining $6,000. The company estimated the initial outlay for the second and third years in a similar fashion, but took actual past sales experience into account.[13] Bubble Up seeks to bring this program within the Sherman Act's definition of a tying arrangement.

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[13]The IMP was not particularly successful in practice. The Coca Cola Company counted on the increase in Sprite gallon sales for the second and third years of the program to keep actual advertising expenditures relatively constant over the IMP's lifespan. As former Coca Cola executive Thomas C. Law explained, this did not occur.

> And it didn't work for a very good reason. . . .
>
> There wasn't enough advertising because, for example, let's say the bottler is going to do 10,000 gallons of syrup the first year. We were going to spend 60 cents a gallon. That would mean we would spend $6,000.
>
> The second year, we were only going to spend 40 cents a gallon. So, in order to spend the $6,000, the bottler would have to do 15,000 gallons, 15,000 times 40 cents is $6,000 again. So, again as much syrup. He would have to have a 50 percent increase in business in order to have $6,000 advertising.
>
> The third year we were only going to spend 20 cents. On the third year he had to do 30,000 gallons of syrup in order for us to spend $6,000.
>
> . . . . .
>
> Cost was going up. Cost of television advertising was getting higher.
>
> So, we were faced with a situation where the bottler had to have a 50 percent increase the second year and had to double his business the third year in order for us to have the same amount of advertising dollar.
>
> Well, obviously, this didn't work, because he just didn't do that. The product didn't grow that fast, and the television cost

In Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1953), the Supreme Court defined a tying arrangement as: "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . ." 356 U.S. at 5, 78 S.Ct. 518. Tying agreements are regarded as illegal *per se* because they curb competition on the merits in the tied product. Standard Oil Co. of California v. United States, 337 U.S. 293, 305-06, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949). "They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market." Northern Pac. Ry. Co. v. United States, *supra* 356 U.S. at 6, 78 S.Ct. at 518. An illegal tying arrangement has four basic characteristics: (1) two separate products (the tying and the tied product); (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in the tied market.[14] Driskill v. Dallas Cowboys Football Club, Inc., 498

went up, now [sic] down, and, as you did more business, you would need more advertising.

So, as soon as we could we did away with investment market. We abandoned it.

Record Vol. 16 at 22-24.

Actually Mr. Law is incorrect about the increase necessary for the third year. A bottler would have to increase purchases to 20,000 gallons rather than 30,000 to achieve the $6,000 figure. *See* text following n.12, *supra*.

[14]Both Sherman Act § 1, 15 U.S.C. § 1 (1970), and Clayton Act § 3, 15 U.S.C. § 14 (1970), prohibit tying arrangements. But § 3 only applies where both the tying and the tied products are "goods, wares, merchandise, machinery, supplies, or other commodities." The standards of proof under the two sections differ. To establish an illegal tying arrangement under § 1, the antitrust plaintiff must show (1) sufficient economic power in the tying product to appreciably restrain competition in the tied product, *and* (2) that the tying arrangement affects a not insubstantial amount of interstate commerce. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). But under § 3, the plaintiff succeeds if he establishes either of the above elements. *Id. See also* Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101 (1970); Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 74 Harv.L.Rev. 50, 55-59 (1958); Comment, Franchise Tie-Ins and Antitrust: A Critical Analysis, 1973 Wis.L.Rev. 847, 851-55.

F.2d 321 (5th Cir. 1974); Coniglio v. Highwood Services, Inc., 495 F.2d 1286, 1289 (2d Cir. 1974).

It is clear that Bubble Up's attempt to characterize the IMP as an illegal tying arrangement must fail. Coca Cola Company was the sole manager of the IMP funds. It was Coke that negotiated with the television stations for the purchase of advertising time. The individual bottlers had no voice in determining the advertisements' content or time slots.[15] Nor did they handle any funds spent under the program. Coca Cola determined which bottlers qualified for the IMP in a given area. The individual bottler obviously benefited from the additional advertising, but he did not "purchase" it.[16] Thus the tying

[15]Given the economics of television advertising, an individual Sprite bottler could not economically conduct a television advertising program in his bottling territory. Television advertising has significant economies of scale, and large national advertisers can obtain the most favorable time slots, and get quantity discounts on advertising purchases. Note, Advertising and Shared Monopoly in Consumer Goods, 9 Column. J. Law & Soc. Prob. 241, 254-55 (1973).

[16]*Cf.* Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955, 92 S.Ct. 1172, 31 L.Ed.2d 232 (1972) (franchisee could obtain franchise only if they agreed to purchase franchisor's cookers, fryers, paper packaging supplies, and spices); Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), cert. dism'd, 381 U.S. 125, 85 S.Ct. 1364, 14 L.Ed.2d 284 (1968) (franchisee required to purchase all store equipment and supplies from franchisor). Coca Cola Company advertising purchases actually defrayed business expenses that the bottler might otherwise

arrangement cases that Bubble Up cites are inapposite to this situation.

Bubble Up also seeks to characterize the IMP as a group boycott or a concerted refusal to deal—another *per se* violation of Section 1. United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); Fashion Originator's Guild v. Federal Trade Comm., 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1915). We find that Bubble Up Corporation has failed to conclusively demonstrate that the IMP falls within the group boycott definition.

A comparison between the IMP and the practices involved in *Klor's Inc.* is illustrative. Broadway-Hale Stores, Inc., a department store chain, operated a branch store next door to Klor's Inc., a small San Francisco appliance store. Klor's alleged that Broadway-Hale conspired with major appliance manufacturers and distributors either not to sell to Klor's or to sell at discriminatorily high prices, putting Klor's at a severe competitive disadvantage. The Supreme Court reversed a summary judgment in favor of Broadway-Hale, holding that the allegations

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have incurred to effectively market Sprite in his area of operations.

Our disposition of Bubble Up's tying arrangement claim obviates any consideration of Coca Cola's contention that Sprite syrup and Sprite advertising really are one product for antitrust purposes. *See* Kugler v. AAMCO Automatic Transmissions, Inc., 460 F.2d 1214 (8th Cir. 1972); United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (E.D.Pa. 1960), aff'd per curiam, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961).

sufficiently described a group boycott or concerted refusal to deal that was illegal *per se*.

Under the Investment Market Program, the Coca Cola Company agreed to purchase additional television advertising in a given television marketing area once Sprite was available to 80% of the consumers there. Coca Cola did not require bottlers to discontinue Bubble Up to gain the additional advertising. Cf. United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). Bubble Up presented evidence on the economic impracticality of bottling two lemon-lime products, arguing that the necessary effect of the arrangement was an agreement to refuse to deal with Bubble Up. But the absence of an explicit agreement to exclude Bubble Up made the purpose of the IMP a jury question, and substantial evidence supports their verdict in Coca Cola's favor. See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970).

The absence of a *per se* violation makes the issue the reasonableness of the IMP. Coca Cola offered economic justifications for the program sufficient to support the jury's implicit finding of reasonableness. In the soft drink industry, a large scale advertising program is essential to build consumer acceptance of a new product. The expense of such a program presents a substantial barrier to entry. The Sprite television advertising program was the Coca Cola Company's solution to the problem of entry into the green bottle market. An individual advertisement would reach a given number of potential customers in the

geographical area covered by the television station's signal. But if Sprite were not available at local retail outlets, the resultant buyer frustration would offset the demand the advertisement had stimulated. Under the IMP Coca Cola would not make the substantial extra expenditures in a television marketing area until satisfied that sufficient distribution capacity existed to meet the consumer demand generated.

The IMP was not so clearly exclusionary as to warrant *per se* treatment under Section 1. Bubble Up could still reach the soft drink consumer through franchise agreements with other independent bottlers. Other evidence indicated the effect of the IMP was to increase competition on the green bottle market at the consumer level. Given the relevant economics, the jury could properly have found the 80% requirement reasonable. Bubble Up was not entitled to a directed verdict or judgment n.o.v. on the Section 1 claim against the IMP.

2. *Vertical Territorial Restrictions*

Bubble Up also claims injury resulting from vertical territorial restrictions that Coca Cola Company imposed on its franchised bottlers. It is true that in almost all cases vertical territorial restrictions imposed by the manufacturer of a product after he has parted with dominion over it are illegal *per se*. United States v. Arnold Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856-1865, 18 L.Ed.2d 1249 (1967). As our Circuit noted in Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975), "[n]otwithstanding, Standard Oil Co. v. United States, 1911, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, *Topco* [United

States v. Topco Assoc., Inc., 1972, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515] and *Schwinn* [United States v. Arnold Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249] read together, suggest that at this point we must accept the fact that the Court has set its face against both horizontal and vertical territorial restrictions, with the possible exception of vertically imposed restrictions by 'new entrants' and 'failing companies' briefly mentioned in *Schwinn*." 506 F.2d at 943. But the record clearly forecloses this challenge.

In the district court, Bubble Up argued that certain Coca Cola Company marketing practices constituted *per se* violations of the Sherman Act. But, the *per se* violations alleged were group boycotts and tying arrangements; Bubble Up never mentioned vertical territorial restrictions. Bubble Up moved for a directed verdict after presenting its own case, and renewed that motion at the close of all the evidence. Not once did Bubble Up mention vertical territorial restrictions in those motions. Further, Bubble Up did not object to the trial court's jury instructions for failure to instruct on vertical territorial restrictions, and did not mention them in its own proposed jury instructions. Bubble Up finally complained of the territorial restrictions in its brief supporting the motion for judgment n.o.v.

Under Fed.R.Civ.P. 50, "[a] motion for directed verdict shall state the specific grounds therefor." Fed.R.Civ.P. 50(a). If denied, a party may move within ten days after entry of judgment "to have the verdict and any judgment entered thereon set aside and to have judgment entered *in accordance with his motion for a directed verdict . . .*"

Fed.R.Civ.P. 50(b) (emphasis supplied). "A motion for judgment notwithstanding the verdict, like a motion for a directed verdict, must state the grounds on which it was made. Since it is technically only a renewal of the motion for a directed verdict made at the close of the evidence, it cannot assert a ground that was not included in the motion for a directed verdict." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2537 (1971). *Accord* House of Koscot Dev. Corp. v. American Line Cosmetics, Inc., 468 F.2d 64 (5th Cir. 1972). Having failed to assert claims based on vertical territorial restrictions during the trial, Bubble Up was not entitled to raise those issues in its motion for judgment n.o.v.[17]

3. *Other Section 1 Claims*

Bubble Up also claims that other Coca Cola Company marketing practices constituted *per se* violations of Section 1. We consider these programs separately.

a. *The Equipment Lending Program*

In 1965, the Coca Cola Company began to loan fountain syrup dispensing equipment to high volume retailers.[18]

[17]It would be a constitutionally impermissible re-examination of the jury's verdict for the district court to enter judgment n.o.v. on a ground not raised in the motion for directed verdict. *Compare* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935) *with* Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879 (1913).

[18]Wilson B. Franklin, Vice President of Coca Cola USA and manager of the fountain sales department, testified that Coca Cola initiated this program purely in response to competitors' similar programs. Record Vol. 23 at 136-37. Coca Cola did not use the program in areas where competitors were not employing it, and would discontinue it in areas where rival soft drink companies abandoned their programs. Record Vol. 23 at 140-41.

The machinery involved dispensed post-mix products,[19] and Coca Cola required the retailer to dispense Coca Cola Company products through all but one valve. The company franchised about 4100 independent wholesalers to service the equipment. Approximately 700 franchisees were independent bottlers also franchised for Coca Cola.[20]

Bubble Up claims that this program is *per se* illegal, but fails to articulate the rationale for that conclusion. We cannot perceive one. The company did not require the retailer to cease selling any product to gain the benefits of the program. Nor did the company forbid the retailer from using other post-mix equipment for competing products. One effect of the program was to increase the number of post-mix products the retailer could sell to the consumer. This competitive benefit is hardly a characteristic of a *per se* illegal practice.

Bubble Up gave its franchised bottlers the right to sell to fountain outlets, while Coca Cola had traditionally retained for itself the right to sell to the fountain trade. In

[19]Post-mix products are soft drinks mixed and dispensed on retail outlet premises with post-mix equipment. Mr. Franklin explained the mechanics of a post-mix system:

> Post-mix equipment is equipment that can take the syrup, whether it would be Coca-Cola syrup or any other syrup, they have a carbonating unit, a refrigerating unit, and a dispensing mechanism, those are the three basic components, from which they can dispense the drink then one at a time. That mechanism may be a one-drink unit, two-drink unit, three-drink unit, four-drink unit.

Fast food operations such as McDonald's, Burger Chef, or Burger King are typical users of a post-mix system.

[20]Bottlers with franchises to bottle Coca Cola or Sprite had no direct connection with the equipment lending program. The Coca Cola Company made the equipment lending agreements directly with the retailer. The company then contracted with fountain syrup wholesalers for maintenance, but not all Sprite or Coca Cola bottlers had franchises to wholesale syrup.

Bubble Up's view, Coca Cola initiated its program to exclude Bubble Up and to make Sprite franchises more attractive to independent bottlers. Coca Cola offered contrary testimony on the question of intent, and presented evidence that the program gave retail outlet consumers an increased number of soft drink choices. Under these circumstances, the question of the exclusionary intent and effect of the practice was for the jury. The verdict in Coca Cola's favor is clearly supported by the evidence.

b. *Cash Bonuses*

A 1964 Coca Cola Company program offered cash bonuses to bottlers for increased Coca Cola sales. Under the program, a Coca Cola franchised bottler participating in a TV co-op would receive a cash bonus of 18 cents per gallon for the amount his 1964 consumption exceeded the 1963 level. The Coca Cola Company did not restrict the use of the cash bonus, but encouraged its expenditure on advertising by offering to increase the bonus 33⅓%. The company offered increased bonuses to those bottlers handling allied Coca Cola Company products such as Sprite, Tab, or Fanta beverages. For example, a Coca Cola bottler with a franchise for Sprite received an additional 2½ cents per gallon allowance on the increased Coca Cola sales. The bonus was based purely on the increase in Coca Cola sales.

There is no tying arrangement or group boycott here. The program's primary goal was to increase Coca Cola sales. The Coca Cola Company felt that an increase in Coca Cola demand would result in increased sales of allied products as well. Record Vol. 16 at 84. Hence the Company

increased the bonus to a bottler with franchises for several Coca Cola products. The evidence indicated that the actual amount of increased bonus for a bottler with a Sprite contract was rather small, minimizing the incentive for a bottler to take on Sprite purely because of the bonus. The jury implicitly found that this practice had legitimate business purposes, and did not constitute an unreasonable restraint on trade. We see no justification for overturning that jury finding.

c. *Various Interchange Programs*

Bubble Up charges that several programs allowing a bottler franchised for more than one Coca Cola product to interchange advertising credits constituted *per se* violations of Section 1, and provided the requisite specific intent for conspiracy and attempt to monopolize under Section 2. Bubble Up implies that requiring a bottler to sign a franchise for an allied product before receiving the interchange authority creates an illegal tying arrangement. But the argument fails. A Coca Cola franchisee could clearly obtain franchises for allied products singly. Merely conditioning interchange authority on the existence of particular franchises does not create an illegal tie-in.

Coca Cola Company presented evidence that these programs enabled the company to allocate its advertising for all of its product lines in a particular area in a more efficient fashion. Thus, if Tab were selling particularly well in one area, the company could spend some of the Tab commitments on Sprite advertising in an attempt to increase consumer demand for that product. The jury could reasonably have found that this was a legitimate business practice.

d. *Miscellaneous Marketing Programs*

Bubble Up makes various other challenges to Coca Cola Company marketing practices. We have carefully examined the record evidence as to these programs, and concluded that they do not fall in the *per se* category. The evidence of exclusionary purpose and effect of these programs was conflicting and in each case the Coca Cola Company presented testimony tending to establish legitimate business justification for the practices questioned. The question of their purpose and effect was for the jury, and we find sufficient support in the record to uphold their verdict as to the Section 1 claims.

B. *Monopolization Claims Under Section 2*

The Coca Cola Company eventually secured Sprite franchises with about 85% of those independent bottlers also franchised for Coca Cola. Bubble Up contends that Coca Cola's success in franchising this group of bottlers for Sprite constituted monopolization of the relevant bottler market in violation of Section 2.[21] Coca Cola, on the other hand, argues that the relevant universe of bottlers is not limited. It claims that all independent bottlers were potential franchisees for Bubble Up in their quest to achieve national distribution. Therefore Bubble Up did not demonstrate that Coca Cola Company possessed sufficient monopoly power to violate Section 2. We think that the jury could properly have found that the relevant market consisted of all independent bottlers across the country,

[21] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U.S.C. § 2.

and, therefore we affirm the verdict favorable to the Coca Cola Company on the Section 2 claim.

The essence of the monopolization offense under Section 2 is "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 1966); Woods Exploration & Pro. Co. v. Aluminum Co. of Amer., 438 F.2d 1286, 1304 (5th Cir. 1971), cert. denied, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972). Monopoly power is "the power to control price or exclude competition." United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956); Turner, Antitrust Policy and the Cellophane Case, 70 Harv.L. Rev. 281, 288 (1956). Monopoly power does not exist in a vacuum. The antitrust plaintiff bears the burden to show the defendant possesses monopoly power in the relevant market. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177-78, 86 S.Ct. 347, 15 L.Ed.2d 247 (1956); American Tobacco Co. v. United States, 328 U.S. 781, 795, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); Telex Corp. v. IBM, 367 F.Supp. 258, 335 (N.D.Okla.1975), rev'd on other gds., 510 F.2d 894 (10th Cir. 1975). Definition of the relevant market is basically a fact question heavily dependent upon the special characteristics of the industry involved. Telex Corp. v. IBM, 510 F.2d 894 (10th Cir. 1975); Acme Precision Products, Inc. v. American Alloys Corp., 484 F.2d 1237 (8th Cir. 1973); Cherokee Laboratories, Inc. v. Rotary Drilling Ser., Inc., 383 F.2d

97 (5th Cir. 1967), cert. denied, 390 U.S. 904, 88 S.Ct. 816, 19 L.Ed.2d 870 (1968).

The trial court below submitted the question of the relevant market to the jury with instructions.[22] Bubble Up now argues that, as a matter of law, the independent bottlers franchised for Coca Cola comprised the relevant market. Bubble Up further argues that the undisputed facts showed *per se* violations of various Sherman Act provisions, entitling Bubble Up to a directed verdict on the liability issues, and leaving only the question of damages for the jury.

We think that the trial court properly denied the motions for directed verdict and judgment n.o.v. Bubble Up and Sprite compete on two levels; both seek bottler franchises and consumer acceptance at the retail level. Testimony at trial showed that, when the Coca Cola Company introduced Sprite, lemon-lime drinks accounted for about 10-12% of total soft drink sales. Also, soft drink syrup manufacturers considered the lemon-lime segment of the soft drink market a separate segment of the retail market.[23]

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[22]Bubble Up did not object at trial to the relevant market instruction the trial court gave; nor does it challenge the adequacy of that instruction here.

[23]Calvin C. Stoddard, a Coca Cola employee, testified:

> The lemon-lime market accounted for 10 or 12 percent of the total market. We, the Coca Cola Company, did not have an entry there. We wanted Sprite as our entry in the lemon-lime market. We wanted to advertise it and put it in the home and cooler market.

Record Vol. 8 at 68. At the time the Coca Cola Company introduced Sprite, Mr. Stoddard was a district manager in Detroit, Michigan. He subsequently held various other positions with the company and was on the marketing staff for company owned plants at the time of trial.

Seven Up dominated the "green bottle" market with over 80% of total sales at the consumer level. To date, neither Bubble Up nor Sprite has been able to make substantial inroads on Seven Up's position in that submarket. Currently Sprite has about 11% of total consumer sales in the "green bottle" market. Sprite clearly did not have monopoly power at the consumer level, and Bubble Up does not claim otherwise.

Instead Bubble Up charges that Coca Cola illegally prevented it from obtaining sufficient bottler franchises to gain national distribution for its product by monopolizing the relevant market of soft drink bottlers. But evidence indicated that any independent bottler could effectively bottle and distribute Bubble Up. The soft drink bottling process is basically the same for all flavors. An independent bottler franchised for Pepsi Cola or Seven Up was still a potential franchisee as the independent bottlers in a given area were reasonably interchangeable. *See* United States v. Grinnel Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). Each of the 3500 independent bottlers made its own business decision on whether to bottle and distribute a lemon-lime drink, which lemon-lime syrup to purchase, and how many lemon-lime drinks to handle.

The fact that Bubble Up and the Coca Cola Company sought franchise agreements with the same group of independent bottlers does not limit the relevant market to those bottlers. Telex Corp. v. IBM, 510 F.2d 894 (10th Cir. 1975); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101 (1920). Both Bubble Up and Coca Cola sought to achieve nationwide

distribution of their lemon-lime soft drink at the consumer level. Evidence indicated that Bubble Up could reach the consumers in a given area through a franchise agreement with *any* independent bottler. The jury could properly have found that all 3500 were potential Bubble Up franchisees.[24] While Bubble Up showed that by 1967 the Coca Cola Company had secured Sprite franchise agreements with 787 of the 934 Coca Cola bottlers, those 787 bottlers represented only about 22% of 3554 independent bottlers. That is an insufficient market share to establish monopolization in violation of Section 2. *See* United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956); *cf.* United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); United States v. E. I. duPont de Nemours & Co., 351 (2d Cir. 1945). Thus the trial court properly denied Bubble Up's motion for judgment n.o.v. on the monopolization claim.

Bubble Up also charges that the Coca Cola Company attempted to monopolize and conspired to monopolize in violation of Section 2. The district court instructed the jury that "In order to determine whether the defendant has monopolized, attempted to monopolize, or combined to monopolize a particular field of competition, you must first determine what is the field of competition or relevant market." The court then defined the essential ele-

[24]Both parties agree that the relevant geographic market was the nation as a whole. That premise appears correct. *See* United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). The Coca Cola Company and the Bubble Up Company sought to market their syrup concentrate to independent bottlers in all areas of the country to achieve and maintain nationwide distribution at the consumer level.

ments of the attempted monopolization and conspiracy to monopolize offenses. Yet the jury found that Coca Cola had not violated Section 2. We find sufficient support in the record to uphold that finding.

The Supreme Court has defined attempt to monopolize as follows:

> The phrase "attempt to monoplize" means the employment of methods, means and practices which would, if successful accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it . . . .

American Tobacco Co. v. United States, 328 U.S. 781, 785, 66 S.Ct. 1125, 1127 (1946). The offense of attempted monopolization requires both specific intent to accomplish the illegal result (acquisition of monopoly power in the relevant market), and a dangerous probility of success in that endeavor. As Justice Holmes said:

> Intent is . . . essential to such an attempt [to monopolize]. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. . . . But when that intent and the consequent dangerous probability exist, [Section 2] . . . directs itself against that dangerous probability as well as against the completed result.

Swift & Co. v. United States, 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518 (1905). *See* Lorain Journal Co. v. United States, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951); American Tobacco Co. v. United States, *supra;* Scranton Const. Co. v. Litton Indus. Leas. Corp., 494 F.

2d 778 (5th Cir. 1974), cert. denied, 419 U.S. 1105, 95 S. Ct. 774, 42 L.Ed.2d 800 (1975); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969).

As noted above, the jury could properly have determined that the more than 3500 independent bottlers across the country comprised the relevant market for sale of lemon-lime soft drink franchises. No evidence indicated that the Coca Cola Company intended to give Sprite franchises to bottlers not franchised for Coke. We think the jury could have concluded that the Coca Cola Company did not have the specific intent to gain monopoly power in the relevant market. That obviates any inquiry into the probability that Coca Cola would succeed in gaining a monopoly position. *Cf.* Panotex Pipe Line Co. v. Phillips Petroleum Co., 457 F.2d 1279 (5th Cir.), cert. denied, 409 U.S. 845, 93 S.Ct. 48, 34 L.Ed.2d 86 (1972).

A similar analysis mandates approval of the jury's verdict on the combination or conspiracy to monopolize claim. Bubble Up had to convince the jury that Coca Cola Company and the groups of independent bottlers across the country who were franchised to bottle Coca Cola combined and conspired to prevent Bubble Up from obtaining the bottler franchises needed to achieve national distribution at the consumer level. American Tobacco Co. v. United States, 328 U.S. 781, 785-86, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946). Numerous witnesses testified to the business justifications for marketing Sprite through the bottlers already franchised for Coca Cola. The various incentive programs had business justifications as outlined above. Further, Coca Cola did not require bottlers to cease bottling Bubble Up as a condition to bottling Sprite. Viewing the evidence in the light most favorable to Coca Cola,

a jury could reasonably have found that Coca Cola did not have the specific intent to prevent Bubble Up from obtaining lemon-lime franchises in the relevant market composed of all independent bottlers. Again the fact that Bubble Up and Coca Cola chose to compete for the same group of bottlers does not limit the relevant market to that group. Since as a practical matter, most bottlers would only sign one lemon-lime franchise agreement, Coca Cola intended to franchise certain bottlers to the exclusion of Bubble Up. But the jury found that Coca Cola fought fairly and won. This is competition on the merits —the *summum bonum* of the Sherman Act. We affirm the denial of the motion for judgment n.o.v. on the attempt and conspiracy claims under Section 2.

III. MOTION FOR NEW TRIAL

Bubble Up alternatively sought a new trial on the following grounds: (1) the court improperly instructed the jury on the treble damages provisions of the antitrust laws; (2) defense counsel's improper jury argument; and (3) improper admission of irrelevant and prejudicial evidence. The trial court denied Bubble Up's motion, and Bubble Up asks that we overturn that decision.

Fed.R.Civ.P. 59 governs motions for new trial. That rule empowers a trial court to grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Decision on a motion for new trial requires an exercise of discretion by the trial court. United States v. Bucon Const. Co., 430 F.2d 420 (5th Cir. 1970); Commercial Credit Corp. v. Pepper, 187 F.2d 71 (5th Cir. 1951). The scope of appellate review of the trial court's

decision is narrow as the trial judge's discretion is broad, and reversal warranted only when he has abused it. Massey v. Gulf Oil Corp., 508 F.2d 92 (5th Cir. 1975); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2818 (1973). We have carefully reviewed the grounds asserted by Bubble Up in its motion for new trial in the context of the entire record. We find that the trial judge was well within the area of his discretion in denying a new trial.

Bubble Up complains vigorously of the trial court's action in instructing the jury that any damages awarded to Bubble Up would be trebled under the provisions of the antitrust laws. Bubble Up also complains of prejudice resulting from the jury argument of Coca Cola Company's counsel relative to the trebling provision.

At the time of the trial, the Fifth Circuit had not yet taken a definite position on the propriety of a treble damages instruction in an antitrust trial. Decisions in other jurisdictions conflicted.[25] The trial judge elected to give the instruction, but also told the jury that they were to assess damages based upon the actual loss incurred, if any.

The trial judge's actions constituted error under our subsequent decision in Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240 (5th Cir. 1974). *See also* Wood v. Gulf Oil Corp., 498 F.2d 1240 (5th Cir. 1974), cert. denied, ... U.S. ....., 95 S.Ct. 1427, 43 L.Ed.2d 673 (1975). However, we feel that Bubble Up suffered no

[25] *Compare* Semke v. Enid Automobile Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972) *and* Sablosky v. Paramount Film Distributing Corp., 137 F.Supp. 929 (E.D.Pa.1955) *with* Bordonaro Bros. Theaters v. Paramount Pictures, 203 F.2d 676 (2d Cir. 1953) *and* Cape Cod Food Prod. v. National Cranberry Ass'n, 119 F.Supp. 900 (D.Mass.1954).

prejudice from this error that would require a new trial. The jury specifically found no violations of Sections 1 and 2. As we have previously indicated, ample record evidence supports that determination. Since the jury found no liability, we do not regard the error in the damage instruction as sufficient basis for a new trial. We reach the same conclusion with regard to the complaint about defense counsel's jury argument relating to the trebling provision.

Bubble Up also seeks a new trial on the ground that the trial judge's action in admitting certain evidence relating to mismanagement and dissension in the Bubble Up Corporation denied it a fair trial. We think the trial court properly admitted the challenged evidence. It related to Coca Cola's position on the causation issue. The trial court properly admitted other evidence on Coca Cola Company's share of the lemon-lime consumer market as relevant to Coca Cola's theory of the case on the Section 2 monopolization claim. Bubble Up's motion for new trial on these grounds was properly overruled.[26]

CONCLUSION

This was a hotly contested eight week jury trial. Both parties presented their positions forcefully and thoroughly in the court below. The jury heard the evidence, and rendered its verdict after receiving comprehensive instructions from the trial judge. We have carefully considered Bubble Up's claims of error, but reject all of them. The jury's verdict must stand.

Affirmed.

[26] Since we uphold the jury's verdict absolving Coca Cola Company of any antitrust liability, we do not consider Bubble Up's complaint of improper exclusion of evidence relating to damages.

Appendix B

United States District Court
Northern District of Georgia
Atlanta Division

Civil Action No. 11,856

Irving Sulmeyer, et al
Versus
The Coca-Cola Company

[Filed Nov. 3, 1972]

ORDER

Judgment was entered on August 2, 1972, pursuant to a jury verdict in favor of the defendant, The Coca-Cola Company. In responding to special interrogatories, the jury found that the defendant had not violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and that the plaintiff, Bubble Up Corporation, had not been injured as a result of any antitrust violations. Pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, the plaintiff now moves for a Judgment Notwithstanding the Verdict and/or a New Trial.

Judgment N.O.V.

The plaintiff moved for directed verdict at the close of all the evidence. The court denied the motion and sub-

mitted the case to the jury. Within ten (10) days after entry of the judgment, the plaintiff filed the motion *sub judice* to set aside the verdict and judgment, and to have judgment entered in accordance with its motion for directed verdict. Rule 50(b) Fed.R.Civ.P.

A motion for judgment notwithstanding the verdict in effect renews an earlier motion for directed verdict, and the applicable judicial standard is the same for both. *United States v. Simmons,* 346 F.2d 213 (5th Cir. 1965). Such a judgment should be entered only when there can be but one reasonable conclusion as to the proper judgment. *Brady v. Southern Railroad,* 320 U.S. 476, 64 S.Ct. 232 (1943); *Powell v. Lititz Mutual Life Insurance Co.,* 419 F.2d 62 (5th Cir. 1969). Where there is conflicting evidence, or insufficient evidence to make a one-way verdict proper, judgment n.o.v. should not be granted. *Banks v. Ass. Indemn. Corp.,* 161 F.2d 305 (5th Cir. 1947). In determining whether the evidence is sufficient the court is not free to weigh the evidence or pass on the credibility of witnesses or substitute its judgment of the facts for that of the jury. Instead, the court must view the evidence in a light most favorable to the defendant, Coca-Cola Company, here and give that party the benefit of all reasonable inferences from the evidence. Wright and Miller, *Federal Practice and Procedure: Civil* §2524.

The plaintiff urges that judgment notwithstanding the verdict must be granted because the uncontradicted facts reveal several grounds for judgment n.o.v. and the plaintiff is entitled to judgment as a matter of law. As the first ground, the plaintiff contends that the Coca-Cola Company's introduction of the product "Sprite" was

based upon the *per se* unlawful foundation of territorial divisions.

The plaintiff claims that the undisputed facts show that the restrictions on territory were the product of the "parent" bottlers, and did not originate vertically from the Coca-Cola Company. Such horizontal divisions of territory, the plaintiff urges, are unlawful *per se. Timken Roller Bearing Co. v. United States,* 71 S.Ct. 971, 341 U.S. 593 (1951); *Addyston Pipe and Steel Co. v. United States,* 85 F. 271 (1898), *affirmed,* 175 U.S. 211 (1899).

In the alternative, the plaintiff insists that even if the restrictions are considered vertical in nature, they are *per se* unlawful under *United States v. Arnold Schwinn & Co.,* 87 S.Ct. 1856, 388 U.S. 365 (1967).

The court cannot agree with the defendant's attempt to distinguish *Schwinn* as involving price fixing[1] or its analysis of Schwinn as a "rule of reason" case.[2] However, it is clear that the question of territorial restrictions did receive full consideration at the trial (over the defendant's objections as to relevancy) and, apparently, the plaintiff failed to establish to the jury's satisfaction that these territorial provisions had any effect on the bottlers' decisions to bottle "Sprite" or to drop "Bubble-Up." Any

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[1]"Nor is this a case of territorial or dealer restrictions accompanied by price fixing, for here the issue of unlawful price fixing was tendered, litigated, decided against the appellant, and appellant has not appealed". 388 U.S. at 373, 87 S.Ct. at 1862.

[2]"Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred . . . is a per se violation of §1 of the Sherman Act." 388 U.S. at 382, 87 S.Ct. at 1867.

evidence of a causal connection was circumstantial in nature, and the jury found in favor of the defendant.

As a second ground for judgment n.o.v., the plaintiff claims that the Investment Market Program, and introductory program of Sprite for the years 1961 through October of 1963, was a per se unlawful tying arrangement and constituted a *per se* unlawful group boycott.

Any evidence of an illegal combination in the nature of a group boycott was circumstantial in nature. There was testimony that the defendant made no effort to persuade bottlers to drop "Bubble Up." There was also evidence that the Investment Market Program was designed to utilize television as an advertising medium, and that, since the television signal area usually extended beyond any one bottler's territory, it was not economically feasible to spend money or television advertising of "Sprite" until the product was available to a substantial portion of the population covered by the television signal.

All the circumstantial evidence was before the jury, but they failed to find an illegal combination in the nature of a group boycott.

It is clear that the Investment Market Program conditioned large amounts of extra advertising credits on the bottlers, who bottled "Sprite" serving at least eighty (80) percent of any television signal area. Under the plaintiff's theory, this condition constituted a *per se* illegal tying arrangement under *Fortner Enterprises, Inc. v. United States*, 89 S.Ct. 1252, 394 U.S. 495 (1969).

In *Fortner* the plaintiff was loaned money on the condition that he use the defendant's product. The plaintiff argues that the present case is even stronger than *Fortner*, since the additional credit was not only conditioned on the bottler taking on "Sprite", but also that the bottler combine, sooner or later, with other bottlers serving at least eighty (80) percent of a television signal area.

It is true that *Fortner* found "no basis for treating credit different in principle from other goods and services", 89 S.Ct. at 1261, and that "tie-ins involving credit can cause all the evils that the antitrust laws have always been intended to prevent. . . ." However, the Supreme Court in *Fortner* remanded the case to the District Court for a trial on its merits, stating "that the petitioner raised questions of fact which if proved at trial, would bring this tying arrangement within the scope of the *per se* doctrine." 89 S.Ct. at 1257.

The case at bar was tried on its merits before a jury and the jury was instructed on tying arrangements at the plaintiff's request. The plaintiff raised no objection to that portion of the charge. The jury, after weighing the evidence, found no illegal tying arrangement in violation of the Sherman Act. Accordingly, the plaintiff's present reliance on *Fortner* is misplaced.

In further support of its motion for judgment n.o.v., the plaintiff calls attention to the fact that the Coca-Cola Company initiated other programs following the 1961-1963 Investment Market Program which were allegedly unlawful, in and of themselves including: (1) the Equipment Lending Program, (2) tying "Sprite" to cash bonuses for increased sales of Coca-Cola, (3) television co-operatives conditioning matching funds on the purchase of "Sprite", (4) permitting advertising funds allocated to Fanta products to be used to advertise "Sprite", (5) the three month

program in 1965 whereby Coca-Cola offered to pay 100% introductory and advertising costs for any bottler who introduced "Sprite", and (6) the extra 20 cent per gallon allowance in addition to the contract allowance on certain conditions.

After due consideration, and in view of the foregoing standards to be applied on a motion for judgment n.o.v., this ground must be denied.

Finally, the plaintiff urges that the undisputed facts show the Coca-Cola Company attempted to monopolize, combined to monopolize, and did in fact monopolize the lemon-lime market of the bottlers of Coca-Cola. This argument rests on the definition of the relevant market. The plaintiff maintains that the relevant market is composed of the bottlers of Coca-Cola, while on the other hand, the defendant insists that the relevant market covers the entire lemon-lime segment of the soft drink industry.

Although some uncertainty exists as to whether the question of relevant market is one of fact for the jury or one of law for the court, the jury in this case was instructed on Section 2 of the Sherman Act and on the relevant market. The plaintiff made no objection to this portion of the charge. The jury found the defendant not to be in violation of Section 2 and such a conclusion was supported by the evidence. Accordingly, this ground is without merit.

New Trial

The plaintiff urges three principal grounds in support of a motion for new trial. First, the plaintiff attacks portions of the defendant's argument to the jury as improper. In its argument to the jury, the defendant referred to the fact that damages would be trebled by the court. The plaintiff claims that such an argument was improper and prejudicial. For reasons hereinafter set forth respecting the instruction to the jury on trebling of damages, the plaintiff's claim is rejected.

The remaining objections to the other portions of the defendant's argument are unfounded and without merit.

As a second ground for a new trial, error is claimed on the court's instruction to the jury that any damages would be trebled by the court.

While there is a division of authority over whether it is proper for the trial court to instruct the jury that its award would be trebled,[3] the Fifth Circuit Court of Appeals in the case of *North Texas Producers Assn. v. Young*, 308 F.2d 235 (5th Cir. 1962) reviewed such an instruction and held it to be permissible.

Furthermore, even if the instruction in the present case were erroneous, the error would be harmless. The jury found the defendant to have committed no antitrust violations. Consequently, the jury did not reach the question of damages, and the charge on treble damages could not have prejudiced the plaintiff.

The third assignment of error in support of the motion for new trial claims that the admission of certain evidence pertaining to the activities and conduct of Leonard Key, a former official of the plaintiff, was irrelevant and prejudicial. Clearly, evidence relating to the activities of Mr.

[3]See, *Semke v. Enid Automobile Dealers Assn.*, 456 F.2d at 1370 n. 11 (10th Cir. 1972).

Key is relevant both to the defense of mismanagement and the issue of proximate cause. Accordingly, this claim is without merit.

Finally, the plaintiff contends that the court erroneously admitted other alleged irrelevant evidence. Without referring specifically to each ground thereof, the court has considered each of these claims carefully and concludes that they are likewise without merit.

Accordingly, for the foregoing reasons, the plaintiff's motion for judgment notwithstanding the verdict and alternative motion for new trial is hereby denied.

So ordered this the 3rd day of November, 1972.

/s/ Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

Appendix C

(Letterhead of
United States Court of Appeals
Fifth Circuit
Office of the Clerk
600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514)

September 24, 1975

To All Counsel of Record

No. 73-2231—Irving Sulmeyer & Arnold L. Kupetz, etc.
vs. Coca-Cola Company

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Edward W. Wadsworth, Clerk
by /s/ Clare F. Sachs
Deputy Clerk

cc: Messrs. Joseph M. Alioto
Lawrence J. Appel
Joseph L. Alioto
Messrs. Glover McGhee
Clayton H. Farnham
Mr. Lawrence J. Morena
Messrs. Charles L. Gowen
Hugh Peterson, Jr.
Jack H. Watson, Jr.
Mr. David Vaughan

Appendix D

STATUTES INVOLVED

(1) 15 U.S.C. § 1 provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be

deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

(2) 15 U.S.C. § 2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

(3) Federal Rules of Civil Procedure, Rules 50 (a) and (b) provide:

"*(a) Motion for Directed Verdict: When Made; Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any

reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Supreme Court, U. S.
FILED
JAN 22 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-893

IRVING SULMEYER and ARNOLD L. KUPETZ,
Co-Trustees in Bankruptcy for
Bubble Up Corporation,
Petitioners,

vs.

THE COCA-COLA COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

I. Questions Presented for Review 1
II. Statement of the Case 3
A. Nature of the Case 3
B. Statement of Material Facts 4
III. Argument of Respondent in Opposition to Certiorari 4
A. The Territorial Provisions 5
B. The Trebling Instruction 6
IV. Conclusion 8
Certificate of Service 8

Table of Authorities Cited

Cases

Pollack & Riley, Inc. v. *Pearl Brewing Co.*, 498 F.2d 1240 (5th Cir. 1974), *cert. denied sub nom. Wood* v. *Gulf Oil Corporation*, 420 U.S. 992 (1975) 7
Semke v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972) 6
Standard Industries, Inc. v. *Mobil Oil Corp.*, 475 F.2d 220 (10th Cir. 1973), *cert. denied*, 414 U.S. 829 (1973) 6

Statutes

15 U.S.C. § 1 3
15 U.S.C. § 2 3
15 U.S.C. § 15 3
15 U.S.C. § 26 3

In The

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OCTOBER TERM, 1975

No. 75-893

IRVING SULMEYER and ARNOLD L. KUPETZ,
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Bubble Up Corporation,
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vs.

THE COCA-COLA COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, The Coca-Cola Company, submits this brief in opposition to the Petition of Irving Sulmeyer and Arnold L. Kupetz, Co-Trustees in Bankruptcy for Bubble Up Corporation, for the Writ of Certiorari, and, for the reasons set forth herein, respectfully urges the Court to deny the Petition.

I. QUESTIONS PRESENTED FOR REVIEW

Although Petitioners set forth five issues in their "Questions Presented for Review" (Petition, pp. 2-3),

it is clear from their argument and citation of authority (Petition, pp. 11-13) that the only questions which even they believe merit attention involve the issues of allegedly illegal territorial provisions and an allegedly erroneous treble damage instruction. Moreover, there is a mischaracterization of the issues in Petitioners' questions numbered 1 and 2, which describe the issues in terms of whether "agreements to divide markets", "tying arrangements" and "group boycotts" are "immunized" from antitrust proscription under certain circumstances. There has never been any contention in this case of antitrust immunity, let alone a holding to that effect by either the trial or appellate court.

The "questions" cited by Petitioners are, in large part, nothing more than disputed *factual* issues which were resolved against Petitioners by the jury. To the extent that Petitioners now present *legal* issues, Respondent respectfully submits that those issues can be more accurately described as follows:

(1) Did the Court of Appeals err in refusing to consider Petitioners' contentions regarding territorial provisions, after Petitioners had failed to present those same issues for resolution by either the trial court or jury?

(2) Did the Court of Appeals err in holding that the trial court's treble damage instruction, and defense counsel's reference to trebling in closing argument, constituted harmless error where, as here, the jury never reached the question of damages?

For reasons set forth below, however, Respondent urges the Court to decline to review even these questions.

II. STATEMENT OF THE CASE

A. Nature of the Case.

On or about January 2, 1968, Petitioners' bankrupt filed suit against Respondent, alleging violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and seeking to recover damages and injunctive relief pursuant to §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. After more than four years of discovery, the case was tried before a jury. During the trial, which lasted almost eight weeks, substantial evidence, consisting of over 7,000 pages of transcript and thousands of pages of documentary evidence, was presented.

Contrary to the impression Petitioners now attempt to create, every significant factual issue was hotly disputed at the trial. Petitioners introduced considerable evidence, mostly circumstantial, in support of their numerous, complex claims. At every turn, Respondent introduced positive, direct evidence to contradict that presented by Petitioners, with the result that the disputed questions of fact had to be resolved by the jury.

At the close of their case, Petitioners moved for directed verdict, claiming that the evidence established a group boycott, violative of § 1 of the Sherman Act, and an attempt to monopolize, violative of § 2. This motion was renewed at the close of all the evidence. Since the facts were disputed, both motions were denied, and all issues were submitted to the jury under comprehensive instructions of the trial court. Petitioners objected to only one instruction, that being the one which informed the jury that the matter of trebling damages was a function of the court and not of the jury. After several days of deliberation, the jury returned its verdict that The Coca-Cola Company had not violated the antitrust laws.

The trial proceedings were best described by the Fifth Circuit Court of Appeals when it observed:

> This was a hotly contested eight week jury trial. Both parties presented their positions forcefully and thoroughly in the court below. The jury heard the evidence, and rendered its verdict after receiving comprehensive instructions from the trial judge. We have carefully considered Bubble Up's claims of error, but reject all of them. The jury's verdict must stand. 515 F.2d 835, 852.

B. Statement of Material Facts.

Petitioners devote a substantial portion of their petition to what they contend to be the material facts of this case. (Petition, pp. 4-10.) It cannot be sufficiently emphasized, however, that Petitioners' statement of fact is nothing more than their own argumentative view of the evidence; in some instances the factual assertions are unsupported by any competent evidence, while in others, the assertions are, at best, one of many possible inferences which could be drawn from conflicting evidence.

We respectfully call the Court's attention to the factual analysis contained in the opinion of the Fifth Circuit Court of Appeals, which, we believe, more fully and accurately describes the relevant facts and, especially, the various advertising programs employed by The Coca-Cola Company. *See* 515 F.2d 835, 839-841, 842-845, 847-850.

III. ARGUMENT OF RESPONDENT IN OPPOSITION TO CERTIORARI

In the argument portion of the petition, Petitioners address only two issues: (1) territorial provisions, and

(2) the trebling instruction. Respondent respectfully submits that neither issue presents any question deserving of the Court's consideration.

A. The Territorial Provisions.

Petitioners first contend that the opinion of the Fifth Circuit Court of Appeals is in conflict with decisions of this Court and of other circuit courts with regard to the territorial provisions. They cite several cases which they contend hold both horizontal and vertical territorial restrictions to be *per se* unreasonable restraints of trade. In this case, the Fifth Circuit Court of Appeals observed:

> As our Circuit noted in *Cooper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975), "[n]otwithstanding, *Standard Oil Co.* v. *United States, Topco,* and *Schwinn* read together, suggest that at this point we must accept the fact that the Court has set its face against both horizontal and vertical territorial restrictions. . . . 515 F.2d 835, 846 (citations omitted).

Whether or not the above-quoted statement is correct, it is clear that the Fifth Circuit Court of Appeals did not decide the territorial issue "in direct conflict with the decisions of this Court" or of other circuit courts of appeals, as contended by Petitioners. (*See* Petition, p. 11.)

In fact, the court of appeals never reached the merits of Petitioners' contentions concerning territorial provisions, because Petitioners had failed to raise them in a timely and proper manner in the trial court. Petitioners did not raise their contentions regarding the territorial provisions in their motions for directed verdict, but, instead, first significantly addressed the is-

sue in their brief supporting their post-trial motion for judgment notwithstanding the verdict. They did not even request a jury instruction on the issue or object to the trial court's failure to give one. Accordingly, Petitioners failed to present their contentions with respect to the territorial provisions to either the trial court or jury, and the court of appeals properly refused to consider their merits for the first time on appeal. Moreover, since the evidence presented at trial did not thoroughly explore the nature, purpose or effect of the territorial provisions, the present record is insufficient to permit a meaningful analysis of this issue.

B. The Trebling Instruction.

Petitioners also seek review of the appellate court's holding that the judge's jury instruction that the trebling of damages was a function of the court and not of the jury was error, but harmless error in the context of this case. The "conflict" cited by Petitioners addresses only the question of whether the instruction was erroneous. On this point, Petitioners prevailed in the court of appeals: "The trial judge's actions constituted error. . . ." 515 F.2d 835, 852. The court went on to hold, however, that, since the jury never reached the question of damages, the error was harmless. On this point, there is no conflict. Other circuit court decisions on this point are in complete accord. *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972); *see also Standard Industries, Inc.* v. *Mobil Oil Corporation*, 475 F.2d 220 (10th Cir. 1973), *cert. denied*, 414 U.S. 829 (1973).

Petitioners' contention that the appellate court's disposition of the trebling instruction conflicts with that court's own earlier decisions is equally erroneous. In *Pollack & Riley, Inc.* v. *Pearl Brewing Company*, 498 F.2d 1240 (5th Cir. 1974), *cert. denied sub nom. Wood* v. *Gulf Oil Corporation*, 420 U.S. 992 (1975), cited by Petitioners, the question was raised in the trial courts by motions in limine, and interlocutory appeals were taken prior to trial. Accordingly, the court never decided the question of actual prejudice, since the charge was never given, and any reference to potential prejudice was clearly *dictum*.

Petitioners also complain of defense counsel's references, during closing argument, to the trebling provision. In doing so, they lift isolated segments from the complex transcript of the lengthy proceedings. The court of appeals, however, had that entire record before it when it concluded:

> The jury specifically found no violations of Sections 1 and 2. As we have previously indicated, ample record evidence supports that determination. Since the jury found no liability, we do not regard the error in the damage instruction as sufficient basis for a new trial. We reach the same conclusion with regard to the complaint about defense counsel's jury argument relating to the trebling provision. 515 F.2d 835, 852.

The jury, having decided that Respondent had not violated the antitrust laws, as reflected in its responses to the trial court's special interrogatories, never addressed the question of damages and, accordingly, could not have been prejudicially affected by either the instruction, the argument, or both taken together.

IV. CONCLUSION

For these reasons, Respondent, The Coca-Cola Company, respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have made due and legal service of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari in compliance with Rule 33(1), Rules of the Supreme Court of the United States, by mailing three printed copies thereof to Petitioners' counsel of record,

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by causing said copies to be deposited in the United States mail, properly addressed, with sufficient air mail postage affixed thereto.

This 21st day of January, 1976.

CHARLES L. GOWEN
Attorney for Respondent and a Member of the Bar of This Court

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-893

IRVING SULMEYER and ARNOLD L. KUPETZ,
Co-Trustees in Bankruptcy for
Bubble-Up Corporation,
Petitioners,

vs.

THE COCA COLA COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

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Subject Index

I — Page

Grounds for petition and argument 1

II

Conclusion 8

Table of Authorities Cited

Cases — Pages

Continental Ore v. Union Carbide & Carbon Corp., 82 S.Ct. 1404 (1962) 3

House of Koscot Development Corporation v. American Line Cosmetics Inc., 468 F.2d 64 (5th Cir. 1972) 4

Interstate Circuit v. United States, 59 S.Ct. 468 (1939) . 5

Northern Pacific Railway Company v. United States, 356 U.S. 4, 78 S.Ct. 514 (1958) 5

Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240 (1974); cert. den., 95 S.Ct. 1427 (1975) 6, 7

United States v. Fenix & Scisson, Inc., 360 F.2d 260 (10th Cir.) 1966; certiorari denied, 386 U.S. 1036, 87 S.Ct. 1474; rehearing denied, 388 U.S. 924, 87 S.Ct. 2096 4

United States v. General Motors Corp., 86 S.Ct. 1321 5

Rules

Federal Rules of Civil Procedure:
Rule 50 4

Statutes

Sherman Act:
Section 1 .....4, 5, 6
Section 2 4

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I

GROUNDS FOR PETITION AND ARGUMENT

The various matters with respect to which Bubble Up respectfully petitions for a writ of certiorari are briefly commented upon with Argument *in seriatim:*

(1) The Appellate Court erred in stating that Bubble Up never mentioned vertical territorial restrictions in the

district court prior to its motion for judgment n.o.v. and in holding that Bubble Up's motion for a directed verdict on the issue of violation was not based upon vertical territorial restrictions;

(2) The Appellate Court erred in failing to rule at all on the proven horizontal territorial restrictions upon which, *inter alia,* Bubble Up's motion for a directed verdict was based.

Appendices A, B and C to the instant petition demonstrate beyond peradventure that the territorial restrictions and divisions of market were *continuously* argued to the district court as being unlawful *per se* and were specified by Bubble Up as a ground for its motion for a directed verdict on the question of violation. In fact, the district court requested and was supplied by the parties with full briefs[1] on the territorial restrictions and Bubble Up's theory with respect thereto *prior* to Bubble Up's motion for directed verdict.

Bubble Up's written statement of motion for a directed verdict[2] states in part:

> "It is respectfully submitted that this Court should direct a verdict in favor of the plaintiffs on the following liability issues: . . .
>
> 2. That the defendant contracted, combined, and conspired with bottlers of Coca-Cola to restrain the trade of competing lithiated lemon lime soft drink manufacturers to sell and distribute to and through

[1]Appendix A.

[2]See also the Statement of Facts forming a part of Appendix B to the instant petition.

> bottlers of Coca-Cola in violation of Section 1 of the Sherman Act (15 USCA § 1); . . .
>
> Many other acts, themselves unlawful, contributed to Coca-Cola's successful building of a monopoly of the distribution system of the bottlers of Coca-Cola. These are, inter alia, the territory restrictions. It is established that the territories were and are the product of the *bottlers,* not Coca-Cola, and therefore illegal *per se* under *White Motor Co. v. United States,* 9 L.Ed. 2nd 738 1963 and the cases cited therein . . ."

As observed by the district court, respondent failed to factually controvert the existence or nature of the territorial restrictions and division of markets.[3] The restrictions are themselves unlawful *per se,* as are the various combined marketing programs which were indisputably formulated and executed by respondent as a direct result thereof, *Continental Ore v. Union Carbide & Carbon Corp.,* 82 S.Ct. 1404 (1962).

The district court considered the horizontal and vertical territorial restrictions as having been properly specified as a ground for Bubble Up's motion for a directed verdict and rejected respondent's attempt to characterize said restrictions as lawful. The district court *failed to rule* at all on the said restrictions for reasons not available to it on Bubble Up's motion for directed verdict, i.e., the question of impact, a question never properly before or decided by the jury.

[3]Appendix A, p. iii. Bubble-Up respectfully suggests that there is no evidence even tending to support the Court's statement that "Bottler territories are a function of plant capacity, delivery truck range, . . . etc. [Opinion ftnt. 11].

Assuming *arguendo,* that Bubble Up had not mentioned "territorial restrictions" in its written statement of motion for a directed verdict, the district court was nevertheless fully aware of Bubble Up's position on said motion with respect to the horizontal and vertical territorial restrictions and division of markets and the requirements of F.R. Civ.P. Rule 50 were fully satisfied; *United States v. Fenix & Scisson, Inc.,* 360 F.2d 260 (10th Cir.) 1966; *certiorari denied,* 386 U.S. 1036, 87 S.Ct. 1474; *rehearing denied,* 388 U.S. 924, 87 S.Ct. 2096.

---

(3) The Appellate Court erred in failing to hold that the refusal by the district court to decide the questions of law raised on Bubble Up's motion for judgment n.o.v. constituted reversible error.

The district court refused to rule on certain claims made by Bubble Up that respondent had violated Sections 1 and 2 of the Sherman Act on the grounds that: the jury had found no *effect,* and Bubble Up had not voiced objection to certain jury instructions.[4] The refusal is clear error, and the Appellate Court's failure to so hold is itself error. *House of Koscot Development Corporation v. American Line Cosmetics Inc.,* 468 F.2d 64, 65 (5th Cir. 1972).

The Appellate Court states, in substance, that Bubble Up "argued" that the IMP had the *necessary effect* of ex-

[4]Appendix A, pp. iii, v. It must be again stressed that the question of "effect" or causation was never decided by the jury.

cluding Bubble Up through combinations. The record is that this exclusionary effect was not argued by Bubble Up, rather it was *directly admitted* by appellee, e.g.:

> "Q. And you knew, as a necessary effect, that if you were successful in having the Coca Cola bottlers take on Sprite who had Bubble Up, that the bottler would drop Bubble Up?
>
> A. [J. Lucian Smith, President of Coca Cola U.S.A.] Oh, yes."[5]

Bubble Up submits that, having established the plan, the invitation to participate therein and the direct restraint on Bubble Up's business as a necessary consequence thereof, the business "purpose" or excuse for respondent's use of the plan is irrelevant, *Northern Pacific, Railway Company v. United States,* 356 U.S. 4, 78 S.Ct. 514 at 518 (1958). *A fortiori* where the "business excuse" is the pre-existing horizontal and vertical territorial restrictions.[6]

---

(4) The Appellate Court erred in failing to hold that the 100% Last Ditch Program constituted a violation of Section 1 of the Sherman Act;

(5) The Appellate Court erred in failing to hold that the Equipment Lending Program [ELP] constituted a violation of Section 1 of the Sherman Act.

---

[5]TR. Vol. 4, p. 53. See: *Interstate Circuit v. United States,* 59 S.Ct. 468 (1939). In *United States v. General Motors Corp.,* 86 S.Ct. 1321, the Court stated;

> ". . . it has long been settled that *explicit agreement* is not a necessary part of a Sherman Act conspiracy . . ." *id.* 1329.

[6]TR. Vol. 14, p. 218.

(6) The Appellate Court erred in failing to hold that the 1964 Cash Bonus Program constituted a violation of Section 1 of the Sherman Act;

(7) The Appellate Court erred in failing to hold that the Interchange Programs constituted a violation of Section 1 of the Sherman Act.

Bubble Up submits that the Appellate Court failed to apprehend that *each* of these programs was *expressly conditioned* upon bottler combinations which same were necessitated by the unlawful territorial restrictions and are, thus, themselves unlawful *per se*.

---

(8) The Appellate Court erred in failing to hold that the payment of money by respondent's wholly owned bottling subsidiary to independent Coca Cola bottlers on the *express* condition that said bottlers *"drop* Bubble Up" constituted a violation of Section 1 of the Sherman Act.

---

(9) The opinion of the Appellate Court with respect to the district court's instruction on treble damages is in direct conflict with the opinion of the Fifth Circuit in *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240 1974; *cert. den.*, 95 S.Ct. 1427 (1975);

(10) The Appellate Court erred in failing to find that the argument of respondent with respect to the damages

claimed by Bubble Up constituted prejudicial error for which a new trial is required.

It is submitted that the district court did not merely instruct on trebling, nor did respondent inadvertently mention the fact of trebling. Respondent argued to the jury with great vehemence that:

> ". . . as soon as I began to talk in the *plaintiff's* terms about $6,000,000.00 here and $9,000,000.00 there and $25,000,000.00 there and $60,000,000.00 there, I somehow feel as though I have been edged over into a terri-[sic] in which I do not want to stand at all. *The evidence does not support a verdict* for the plaintiff."[7]

Of course petitioner never spoke in terms of $25,000,000.00 or $60,000,000.00, nor did the district court. This is the precise argument on *liability* that the Fifth Circuit ruled impermissible in *Pollock supra*. If it is error to instruct on trebling, it is error to argue trebling; *a fortiori* to argue the highest dollar amount which could *possibly* result from trebling; *a fortiori* to characterize the highest trebled amount as "plaintiff's terms"; *a fortiori* to argue against the return of a verdict on that basis.[8]

Respondent's argument left the jury with the notion that a verdict against appellee on violation could result in a damage award of up to $180,000,000.00. Avoidance of this clearly outrageous and severely prejudicial tactic is the whole rationale of the Fifth Circuit's opinion in *Pollock, supra.*

---

[7]TR. Vol. 34 p. 115.

[8]In *Pollock, supra*, the Court stated:

> "The *justifiable* fear of anti-trust plaintiffs is that the juries will adjust the damage award downward *or find no liability*, therefore thwarting Congress's purpose . . . *id.* 1242.

II

CONCLUSION

For the foregoing reasons, Bubble Up requests that this writ be granted and the judgment of the Court of Appeals for the Fifth Circuit be reversed.

Dated, San Francisco, California,
January 30, 1976.

Respectfully submitted,
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LAWRENCE J. APPEL,
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By LAWRENCE J. APPEL,
Attorneys for Appellants
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(Appendices Follow)

APPENDICES

Appendix A

PARTIAL CHRONOLOGY

On December 13, 1972, appellants [hereinafter "Bubble Up"] filed their Pre-Trial Statement pursuant to F.R.Civ. P. Rule 16 and therein stated, *inter alia:*

> "This is a private, treble damage action brought under Section 4 of the Clayton Act (15 U.S.C.A. 15) by an independent soft drink manufacturer alleging that it was injured in its business and property by reason of violations of Sections 1 and 2 of the Sherman Act (U.S.C.A. 1, 2) by the defendant the Coca Cola Company . . .
>
> Once having combined with the Coca Cola Company bottlers for all allied products, the defendant, in combination with the independents, [bottlers] combined to monopolize the entire soft drink industry. These endeavors *involved many combinations with the bottlers in restraint of trade; principally,* group boycotts, *stabilization of prices, divisions of markets,* and tie-in combinations."

On or about February 11, 1972, the District Court entered the final Pre-Trial Order which stated, *inter alia:*

> "STATEMENT OF CASE: This is an action under the Clayton Act, 15 U.S.C. §15, in which the plaintiff seeks to recover from the defendant damages alleged to have been sustained by the plaintiff resulting from the defendant's alleged violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, in the following particulars: (1) organizing meetings of independent Coca-Cola bottlers throughout the country with the specific purpose of boycotting the plaintiff's product and substituting the defendant's product, Sprite; (2) attempting to and destroying bottles in certain circumstances that were to be used for the production,

> distribution and sale of the plaintiff's product; (3) *organizing markets* throughout the country with the specific purpose of inducing and persuading independent Coca-Cola bottlers in specific areas to combine to boycott the plaintiff's product; (4) permitting the independent Coca-Cola bottlers to interchange vast amounts of advertising monies so as to persuade them to drop the plaintiff's product in favor of the defendant's product, Sprite; (5) paying for the entire introductory costs of advertising for the defendant's product with strategic Coca-Cola bottlers in an effort to initiate the group boycotts; (6) tying the independent Coca-Cola bottlers with each other in the common plan and program inviting group boycott of the plaintiff's product through the use of the exclusive Coca-Cola bottler magazine; (7) *tying the defendant's product, Sprite, directly to the defendant's product, Coca-Cola;* (8) selling Sprite at low predatory prices to independent Coca-Cola bottlers to drive out the plaintiff. Plaintiff further seeks injunctive relief against alleged future violations of the Sherman Antitrust Act."

On or about May 6, 1972, Bubble Up filed its motion for leave to file an amended and supplemental complaint and in connection therewith stated:

> "This lawsuit results from a successful effort by the defendant Coca-Cola to displace all non-Coca-Cola manufactured products which were bottled by independent Coca-Cola bottlers. One of the primary victims of the acts by the defendant Coca-Cola was the plaintiff Bubble Up. In order to maintain its share of the soft drink market and to eliminate competition for the non-cola market of the independent Coca-Cola bottlers, the Coca-Cola Company, beginning in 1960, began to manufacture non-cola products. These prod-

ucts were for the exclusive use of the independent Coca-Cola bottlers. The Coca-Cola Company, in its beginning stages, distributed non-Cola allied products to the independent Coca-Cola bottlers, relying heavily on the relationship between the independent Coca-Cola bottlers and the Coca-Cola Company. *This relationship consisted largely of the product Coca-Cola, illegal territorial agreements,* and exclusive services and products generated by the Coca-Cola Company for itself and the independent Coca-Cola bottlers."[1]

On June 5, 1972 jury trial commenced and, thereafter, substantial evidence directly establishing the *per se* unlawful vertical and horizontal territorial restrictions and divisions of markets between and among the Coca Cola bottlers and between appellee and the Coca Cola bottlers was admitted without objection.[2]

On June 12, 1972, appellee orally moved the district court to strike certain evidence respecting the unlawful vertical and horizontal territorial restrictions and divisions of markets.[3]

On June 12, 1972, the following testimony was taken from John P. Austin, chairman of the board of appellee,

[1]Bubble Up's motion was granted by the district court on May 31, 1972.

[2]e.g.: TR. Vol. 1, pp. 46, 47, 73, 91 [Opening Statement] 198-204; Vol. 4, pp. 164-171; Vol. 5, pp. 121-130; Vol. 6, pp. 85, 103, 111, 191, 194, 195, 226.

Appellee failed to object *at all* to the admission of Plaintiffs Exhibit 760, principally relied upon by Bubble Up in showing the origin and nature of the *per se* unlawful vertical and horizontal territorial restrictions. TR. Vol. 19, p. 237. (Emphasis supplied).

[3]TR. Vol. 6, pp. 3-44.

and in connection therewith the following colloquy occured:

"Mr. Gowen: Your Honor please, we object to the testimony with respect to the territorial restrictions and move to strike it on the ground that it is not relevant and material to the issues in this case, and that the Court has heretofore specifically removed it from the realm of inquiry before this jury.

The Court: I don't know that territories in and of itself has been attacked as being a violation of the antitrust laws. As many things have been said in this case, the explanations are not dealing with the subject matter. I don't understand the materiality of it.

It's already in evidence. I don't know that it is harmful to be in or out at this point. If there's any contention to it, maybe we will find out; if not, I'll strike it.

Mr. Alioto: Well, also, Your Honor, counsel is incorrect in that Your Honor dropped it from the pretrial order. There is a specific statement with respect to specific underlying evidence. Your Honor did not require the plaintiffs to state the general allegations, although this was one of those—this was one of those general allegations.

The Court: Well, go ahead with your questioning.

Mr. Alioto: Yes, sir.

By Mr. Alioto:

Q. Now, for the introduction of Sprite you relied upon, did you not, the territorial, to some extent, the territorial restrictions between the bottlers?

A. Yes; that is correct.

Q. And you would fix the Sprite contract directly to the territory?

A. That is correct."[4]

[4]TR. Vol. 6, pp. 193-194.

On June 14, 1972, the following colloquies occurred between the district court and counsel for the parties in connection with appellee's motion to strike:

> Mr. Alioto: I just have one matter, Your Honor, and that would be, as we mentioned to the Court yesterday, we would like to simply orally rebut the Motion to Quash and the Motion to Strike by simply stating with respect to the Motions to Strike, which are in two areas, Your Honor, one on the fountain sales and one on the territories, the motion was made on the ground they were irrelevant.
>
> . . .
>
> With respect to the territories, again, we say that the defendant, if they had an objection, which we don't think they do, clearly waived it by not bringing it up at the time.
>
> And, further, Your Honor, that the territories are clearly relevant since these witnesses, including Mr. Austin, said they relied, in whole or in part, upon the territorial arrangements for the introduction of Sprite, and the evidence has shown that they used the territory to curtail sales of Bubble Up in a number of ways, one of which being that when one neighbor didn't have Bubble Up the other neighbor could not sell in his region, sell Bubble Up in his region. But, more importantly, that this was the founding corporation [sic] among the bottlers which set forth the intricate plan called the Investment Market Program and later the consolidated or what are called these production centers, the idea that Mr. Harvey told us about yesterday.
>
> . . .
>
> The Court: Well, the territorial thing maybe raises another question. The only issue—the only testimony I have heard—most of the testimony I have

> heard about territorial arrangements had to do with advertising.
>
> . . .
>
> Mr. Gowen: . . . The territorial restrictions are different from the merger issue. The territorial—the objection to the territorial evidence is to the competitive *effect* of territorial restrictions under which The Coca-Cola Company allocated certain territory to a bottler. We do not think that is relevant, and this is one of the——
>
> The Court: It seems to me there is no issue, there is really no issue in this case that Coca-Cola has allocated territories.
>
> Mr. Gowen: No, sir; *no issue about that.* We simply think it is not relevant to this particular case.
>
> The Court: Obviously, if it were a per se antitrust violation to allocate territory to Sprite, it would be a per se violation for Coca-Cola to do it for the production Coca-Cola.
>
> Mr. Alioto: It is, Your Honor, a per se violation. It is a per se violation in what they are doing with Coca-Cola, and it is a per se violation for Sprite.
>
> The Court: Well, I haven't ready any decisions that say allocation of territory, to a dealer in a commodity, is a per se violation of the antitrust laws.
>
> Mr. Alioto: I would direct two cases to Your Honor on that. One is the Supreme Court case in Sealy.
>
> The Court: What?
>
> Mr. Alioto: Sealy, S-e-a-l-y.
>
> The Court: Give the citations.
>
> Mr. Alioto: United States against Sealy. I can give the cite to the Clerk.
>
> The Court: Give it to Mr. Butters back there. He has a pad.
>
> Mr. Alioto: And a new one called Topco.

The Court: What are we doing in court if that is true?

Mr. Alioto: Well, this is one of the things, Your Honor. They also have company-owned operations which are subsidiaries, and, therefore, are in competition with their own bottlers. That not only makes it vertical, but it also makes it——

The Court: I thought the company-owned bottlers also had territorial allocations, too.

Mr. Alioto: They have their own territory, and they divide territory with neighboring independent bottlers. In other words, the company-owned territory, bottling plant, cannot distribute outside of its geographic territory either.

So it's not just a straight vertical, like an arrangement with the dealer; it's also horizontal among a number of competitors.

But also this foundation, *these violations* which are the foundation, were used and relied upon the way Mr. Austin said in the marketing of Sprite.

The Court: *Well, I say if it's a violation, either one, Sprite or Coca-Cola, it's a violation, period,* I'm wondering why we're in court. There's no issue but that they did that.

Mr. Alioto: We are saying—what—we are not *just* challenging that.

The Court: I am surprised you didn't—I am surprised, if it was a per se violation, why you didn't make a motion for summary judgment as to liability.

Mr. Alioto: Well, we fully intend to make such a motion, Your Honor, after the presentation of our evidence.

The Court: I want to see some authority on that.

Mr. Gowen: Yes, sir.

The Court: Because I think there are a lot of companies in this country in pretty bad shape, if that's true.

Mr. Alioto: That's absolutely correct, Your Honor.

But we, of course, are not the government. We *have to show our impact,* and, of course——

The Court: I realize that. I can see on a territorial restriction *coupled with other acts* could be a violation of the antitrust laws, and this is really how most of these private antitrust cases—I assume this is why you are making the effort you are making *to try to tie different acts in to show a violation.*

Mr. Alioto: Well, *ordinarily,* Your Honor, you have to *add up a number of acts* which might be legal in themselves, and you come out with something that is illegal. *In this particular case there are a number of acts that are per se illegal themselves.*

The Court: You have raised another very disturbing point. *I haven't concerned myself about a per se violation just because of territorial restrictions.* I will look at the cases, and if you would give me the citations I would appreciate it. . . .

The Court: *As I say, if it's a violation per se, that's a violation in and of itself, I'll have to go into it. I'll go into that."*[5]

On June 19, 1972, Bubble Up, pursuant to the direction of the district court, supplied the court with its letter brief on the unlawful vertical and horizontal territorial restrictions and division of markets in opposition to appellee's motion to strike and stated; *inter alia:*

> ". . . The defendant has, by way of oral motion made without citation to any authority and without benefit of any written brief or argument to which the plaintiff might respond, moved the Court that certain portions of the testimony of adverse witnesses called by the plaintiff for purposes of cross-examination be

[5]TR. Vol. 8, pp. 3-5; 170-176. (Emphasis supplied).

stricken from the record. Defendant appears to have based its motion on a general claim of irrelevancy. The plaintiff denies the existence of this ground or any ground for the exclusion of the evidence subject to defendant's motion to strike, and claims additionally that under the provisions of Rule 15(b) of the Federal Rules of Civil Procedure it is entitled to have this evidence remain in the record and introduce other evidence of like kind.

. . .

[A.]

One serious restraint placed by the defendant upon large portions of this distribution market of skilled bottlers which had an effect upon both the bottlers and Bubble Up was the territorial restrictions clause contained in the bottlers' contract with the defendant.

In 1959 and 1960, when the plaintiff made a concerted effort at entry into this bottler market it found that the geographical territory for which any single bottler of Coca Cola would undertake to bottle its product was determined *not* by the competitive contours of the retail or consumer market available to the bottler, (i.e. supermarket warehouses, etc.) *nor* by reference to the financial ability of a bottler to effectively compete, but by sole, complete and exclusive reference to that territory for which the bottler could bottle and sell Coca Cola. The plaintiff in most cases simply did not have the reasonable business opportunity to discuss or negotiate with the Coca Cola Bottlers concerning the nature and extent of the territory a specific bottler might be able to service with the product Bubble Up. The plaintiff's franchise agreements were arbitrarily made to conform to the territorial limitations set out in the bottler's Cola franchise, limitations strictly enforced by the defend-

ant (Richard Harvey). The defendant had actual knowledge of the fact that the territorial limitations set out in its Cola franchises had the effect of defining the area for which a bottler might bottle other products, either by contract (Bubble Up) or through "gentleman's agreements", (Exhibit 6). In those rare situations where a bottler flaunted the defendant's territorial restrictions and independently determined the geographic area for which he could bottle the plaintiff's product he was subjected to severe harrassment if he attempted to do so much as carry a case of Bubble Up across the "magic line" without changing out of his Coca Cola uniform or repainting his Coca Cola truck with full knowledge of the *practical* business effect such "legal" segregation would have on the bottler and his ability to continue with Bubble Up and the willingness of other Coca Cola Bottlers to take it on in the first instance.

. . .

The division of territories between otherwise competing bottlers is a subject which is sacred to the Coca Cola Company and the bottlers, and the defendant has continually promised the bottlers that it would not disturb this relationship between them. The defendant has honored and observed these exclusive territorial restrictions to its own monetary detriment with a resulting foreclosure from entrance into several major metropolitan markets for lemon/line including the tremendous Los Angeles market. (Footnote omitted).

In point of fact these arbitrary territorial restrictions were initiated *by the bottlers* at a time when the defendant had already achieved one hundred percent (100%) national distribution of fountain Coca Cola, and resulted in the "one stable product, one package

and one price" (5¢ everywhere) alluded to by Mr. Austin. These territories were never determined by the natural forces of competition. Even if the territorial restrictions in the contract were in their inception related to competition (which was not the case), that fact cannot be used to sanction these price-stabilizing contracts in today's market place; to the contrary, the fact that these contracts were granted in *perpetuity* is strong evidence that the bottlers and the company (through its company owned plants) consciously created a situation that could *not* adapt to market forces.

. . .

The defendant *admittedly* did not undertake, in 1961, when it introduced Sprite, to ascertain the amount of territory for which any particular bottler could profitably bottle and sell Sprite. Instead, it chose to continue to avoid product and price competition between bottlers by adhering to the 1890 Cola territorial restrictions.

The defendant, most incredibly, then went on, by initiating the investment market program, to *define geographically* the *actual* territory for which a bottler could bottle Sprite. Coca Cola thus kept the best of both worlds in introducing Sprite: in place of giving bottling rights to a bottler to service a geographic area which had been delineated by some reference to the competitive market place in which the bottler would do business (the area serviced by a supermarket warehouse or the geographical ambit of a given television signal), it kept the bottlers restricted to arbitrary marketing geographies and actually showed them how they could, *if* they handled only Coca Cola soft drink products, *combine* their efforts in the *actual* geographically relevant market and then went on to

create, in 1962, a separate corporate functionary (George Trippe, Plaintiff's Exhibit 518) for the purpose of demolishing through consolidation and merger, the arbitrary, price-stabilizing territories to which they had restricted the Sprite bottlers in the first instance!

B. *The Law*

The division of markets among competitors is illegal per se. *United States vs. Addyston Pipe and Steel Co.,* 85 F. 271, affirmed 20 S.Ct. 96 (1899). This is so even if the division of territory is between or among subsidiaries of the same corporation. *Timken Roller Bearing Company vs. United States,* 71 S.Ct. 971 (1951). To the extent that the Coca Cola Company operates bottling companies throughout the United States in competition with independent bottlers of Coca Cola, the division of market is *per se* unlawful.

It is also the law that the division of markets among wholesalers (bottlers) through vertical contracts with a supplier (Coca Cola) is per se unlawful.

The first case to meet this vertical question was *White Motor Company vs. United States,* 83 S.Ct. 696 (1963). In that case a divided court speaking through a majority of four and one concurring with three dissents, the Supreme Court held that vertical geographical restraints imposed by smaller companies in an effort to compete against larger companies *may,* in those circumstances, not be a *per se* violation. In *White Motor* the Supreme Court remanded the case for trial on the merits to determine if the vertical geographical restraints, even for a small company, may be saved by the claim of the small company that it needed such restraints to compete against the

larger companies. In the dissent by Mr. Justice Clark, together with the Chief Justice, and Justice Black, Justice Clark stated "I believe that these bare bones really lay bare one of the most brazen violations of the Sherman Act that I have experienced in a quarter of a century." The holding by the majority clearly limits such vertical geographic restrictions, at least until after trial, to a small company which may need such restrictions to break into or to stay in a business. The separate opinion of Mr. Justice Brennan concurs with the majority but only on the condition that the restriction was by the supplier and *not the product of the wholesalers* (bottlers). Both the majority and the concurring opinion agree that if the restrictions were simply "formally imposed by the manufacturer rather than through inter-dealer agreement" that such formality would not save such restrictions from the condemnation of the Sherman Act, citing *Interstate Circuit, Inc. v. United States,* 59 S.Ct. 46.

The next treatment of such vertical territorial restrictions by the Supreme Court was in *United States vs. Sealy,* 87 S.Ct. 1847 (1967). There the Court held that such restrictions were per se illegal in that the Court found that the substance of the restrictions rather than the form clearly showed them to be the product of the wholesalers (bottlers) and not the creation of the manufacturer (Coca Cola), even though each wholesaler had an individual contract with the manufacturer which set forth the territorial restrictions.

The next case to deal with the question was *United States vs. Arnold, Schwinn & Company,* 87 S.Ct. 1856 (1967). In that decision the Supreme Court held that vertical restraints as to territory among wholesalers

(bottlers) were a per se violation of the Sherman Act if the restrictions were used in whole or in part to eliminate *price* competition by the competing wholesalers (bottlers). It has already been testified to by one of the witnesses, Mr. Smith, that the territorial restrictions eliminated both price and product competition. But even that condition was recently removed by the Supreme Court.

On March 29, 1972, two months ago, the Supreme Court in *United States vs. Topco Associates,* 92 S.Ct. —1972, held that a cooperative known as Topco served as an intermediate wholesaler for a group of retail grocery stores. Topco procured and distributed to its members different products. Payment was made by the members either to Topco or directly to a manufacturer. The Court treated the relationship of Topco to its members as a horizontal arrangement, and therefore illegal *per se.* The basic arrangement made by each member with Topco was that Topco controlled brands would be sold only within the marketing territory allocated to a member and that the member would refrain from selling Topco controlled brands outside such marketing territory. The lower court, after trial on the merits, found the arrangement to be reasonable in that it permitted small retailers to compete against the large retail chain stores. The Supreme Court reversed, finding the arrangement to be illegal *per se.* Although the Court treated the arrangement as horizontal in substance, it cited the *White Motor* case and equated territorial limitations with the reasoning of the Supreme Court in *United States v. Trenton Potteries Co.,* 47 S.Ct. 377 (1927), that however reasonable a *per se* violation may appear today, economic and business changes make it the unreasonable practice tomorrow." [All emphasis in original].

• • •

On June 19, 1972, appellee filed its brief in support of it motion to strike and, thereafter, filed its "response to plaintiff's letter of June 19, 1972" on the question of the unlawful horizontal and vertical territorial restrictions and divisions of markets.

On June 22, 1972, the district court overruled appellee's motion to strike certain evidence respecting the unlawful vertical and horizontal territorial restrictions and division of markets.[6]

On June 26, 1972 the following colloquies occurred between the district court and counsel for the parties:

"Mr. Watson: Next to the last question beginning with:

"Mr. Koch, when you entered into the franchise agreements", we object to the remainder of that page and the top of page 146——

The Court: Down to where on 146?

Mr. Watson: Down to the word "generally", almost in the middle of the page.

The Court: Let me read it.

Mr. Watson: Do you want me to read this into the record as we go along?

Mr. Alioto: That's the way we have been doing it before.

Mr. Dowen: [sic] I don't think the record would be complete without it, then.

Mr. Watson: Question: "Mr. Koch, when you entered into the franchise agreements with Coca-Cola bottlers you attached to that agreement a description of the territory in which that bottler could sell or distribute Bubble Up?

Answer: "Correct."

[6]TR. Vol. 14, p. 43.

Question: "Is it true that geographical description was determined in most instances by the territorial outline in which that bottler could sell Coca-Cola Products?"

Answer: "That's right."

Question: "Would bottlers from time to time, would Coca-Cola bottlers from time to time insist that the Bubble Up franchise that you negotiated with them contain a territorial description which conformed to the Coca-Cola territorial description?"

Answer: "Yes."

Question: "Would they insist upon that as a condition that had to be satisfied prior to entering into an actual franchise with Bubble Up?"

Answer: "Generally."

We object to that on the same grounds that we have maintained our objection, that territorial boundaries in this case are not at all *related to the decision* on the part of the bottler to take Bubble Up on or not, or to take Sprite on or not. We regard it as irrelevant and immaterial to the issues as outlined in the pre-trial order.

The Court: Well, in view of my previous ruling, if that's the objection, I will overrule the objection."

• • •

On June 29, 1972, the following colloquoies occurred between the district court and counsel for the parties:

"Mr. Appel: That was page 12. That's all we have from the—let's see, 47 and 48 and 49 of the December, 1960, "Coca-Cola Bottler" which is an article by C. W. Seifert, president of the Coca-Cola Bottlers Association, which speaks about the need for cooperation, *cooperation on a regional and area basis,* and also talks about the *territorial question* that was coming up as a result of the chain store age, as it is called in the article itself.

"These main developments point up quite dramatically to my mind, at least, one vital factor I want to consider as a bottler of Coca-Cola—what I do today in my *territory* undoubtedly will affect my neighboring bottlers, and on the other hand, the policies my neighboring bottlers pursue will have a direct impact on my own operation."

This is right at the beginning when they began the investment market program, Your Honor.

Mr. Peterson: We object to it on the grounds it is irrelevant and immaterial.

The Court: I'll admit it.

Mr. Appel: We would offer pages 46 and 47 of the November, "Coca-Cola Bottler", Your Honor, which is a speech by Patrick O'Malley, vice-president of Coca-Cola, which states—I would like to get the exact language on this one, Your Honor. I have a quote from it here which states, "About the only things left that will be sacred and untouched are the *bottlers' own territorial lines.* Coca-Cola business should always be the heart of his business. Without Coca-Cola, the Coca-Cola Company is nothing; without Coca-Cola, the bottler of Coca-Cola is nothing."

Your Honor, this is the disintegration and threats to the territorial lines in the late 50's and early 60's.

The Court: What is the threat?

Mr. Appel: Your Honor, this relates to our contention that the Fanta Beverage Company, in issuing franchises, didn't undertake to reassess what *territory* a bottler might be able to actually bottle and sell products in, but, instead, chose to issue those franchises, contracts, *in strict conformance with Coca-Cola contracts.*

This is a promise made by the Coca-Cola Company to the bottlers that those lines will remain sacred, and now the only thing they have to do is combine, to get in marketing groups, to get together.

Mr. Peterson: Your Honor, the article doesn't say all of that.

We object to it on the ground that it is irrelevant and immaterial.

The Court: I like to have things . . . . I learned in law school that I couldn't accept that. Everybody is a little bit geared to their side of the case.

Tell me what it says in the article that you contend would, in any way, be relevant to the issues in this case. Quote it to me.

Mr. Appel: All right.

The Court: I don't mean quote the article.

Mr. Appel: Your Honor, they talk about a challenge in the market place. "To accomplish this demands first a frank appraisal of the facts, a clear definition of the major challenges that face us in the market place today."

Then, it has, "Editor's Note: Here Mr. O'Malley addressed the problems and potentials of the business." They are talking about a particular challenge here.

Then it does on and states—then it goes on to say, "*In this new drive* towards the potential of which our business is capable, about the only thing left that is *sacred and untouched are the bottler's own territorial lines.* We can speak like this because when the company and the bottlers meet in convention, they must talk to each other heart to heart with all the barriers down."

That is a direct quote, Your Honor.

Mr. Peterson: We again object to it on the ground it makes no mention of the product Sprite in any way, directly or indirectly.

The Court: I will go ahead and let it in.

The Clerk: Plaintiff's Exhibit 781.

Mr. Appel: We would offer pages 63 and 65 of the November '63—these have already been marked,

Your Honor, but let me—this particular speech by Charles W. Seifert is addressed to the bottlers. This is a man that was the president of the Coca-Cola Bottler Association and who has from time to time had a representative on the Coca-Cola's board. Let me give you some of the language.

"And when competition starts a fight, we will ask no quarter, we will give no quarter, and we will continue working together to retain our position of leadership. We cannot afford the slightest sort of peaceful co-existence. *We are after the commercial scalp of our competitors.* We may make an occasional mistake."

Your Honor, this is cooperation, the key to this kind of success.

The Court: Who is saying all of this?

Mr. Appel: This is the president of the Coca-Cola that is saying this.

Mr. Peterson: That is not right. It is Charles W. Seifert. He is a Coca-Cola bottler. He happens to be dead now, but he ran a bottling plant in New Hampshire. He is not an employee of the Coca-Cola Company, never has been.

Mr. Appel: This is *their* [the Coca Cola Company] publication. They sent it to us.

The Court: I will admit it.

• • •

Mr. Appel: Just a couple in this one, Your Honor. We have in '68 a few more.

Page 7 of the June, 1968, "Coca-Cola Bottler", Your Honor. This particular issue they are talking about contact with supermarkets. . . .

It goes on to say a team effort—this is a Coca-Cola company operating at a national level for the bottlers because the bottlers themselves, because of the *territorial restrictions*, can't approach and sell to supermarket warehouses. *This territorial restriction is one of the things that Mr. Ryan testified to today*

that had an impact on Bubble Up in trying to get Coca-Cola bottlers.

This is the way the Coca-Cola Company is dealing with it by going at the national account level through one spokesman, not each bottler going to the retail outlets, but having the Coca-Cola Company go to the national level and filtering it down to the bottlers in order to *avoid the territorial restriction.*"[7]

• • •

On June 30, 1972, Bubble Up orally moved the district court for a directed verdict on the ground, *inter alia,* that the uncontroverted evidence showed that appellee had violated Section 1 of the Sherman Act, [15 U.S.C. § 1]. On Saturday, July 1, 1972, Bubble Up, in accordance with its understanding of the direction of the district court, served upon the appellee and delivered to the district court a written statement of its motion for a directed verdict together with supporting authorities and a statement of the undisputed facts relied upon by Bubble Up in connection therewith. Said written statement is attached to the instant petition as Appendix B.

On July 3, 1972, appellee responded by letter to Bubble Up's written motion for a directed verdict.

On July 5, 1972, the district court "temporarily overruled" Bubble Up's motion for a directed verdict.[8]

On July 21, 1972, Bubble Up renewed its motion for a directed verdict on the ground, *inter alia,* that the uncontroverted evidence showed that appellee had violated Section 1 of the Sherman Act [15 U.S.C. § 1].[9] The said motion was overruled by the district court.[10]

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[7]TR. Vol. 19, pp. 241, 254-258, 269, 270. (Emphasis supplied).
[8]TR. Vol. 21, pp. 22, 23.
[9]TR. Vol. 33, pp. 56-71.
[10]TR. Vol. 33, p. 71.

Appendix B

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Honorable Albert J. Henderson, Jr.
Judge, United States District Court
Old Post Office Building
Atlanta, Georgia

RE: Irving Sulmeyer and Arnold L. Kupetz, Co-Trustees In Bankruptcy for Bubble Up Corporation, Civil Action No. 11856 in the United States District Court for the Northern District of Georgia

Dear Judge Henderson:

This letter sets out the basic authority of the plaintiffs in support of their motions (1) to direct a verdict on the issue of liability and (2) to exclude evidence which the defendant indicates it will offer.

I.
Directed Verdict

A short statement of the undisputed facts is attached to this letter as Exhibit A.

Although the Courts greatly disfavor the granting of summary judgments, directed verdicts, and judgments NOV against antitrust plaintiffs, Poller v. CBS, 82 S. Ct. 486 (1962), Norfolk Monument Co. v. Woodlawn Memorial Gardens, 89 S. Ct., 1391 (1969), Fortner Enterprises, Inc. v. United States Steel Corp., 89 S. Ct. 1257 (1969), Continental Ore v. Union Carbide and Carbon Corp., 82 S. Ct. 1404 (1962), Cornwell Quality Tools, Inc. v. C.T.S., 446 F.2d 825 (9th Cir. 1971), Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971) because "motive and intent play leading roles, the proof is largely in the hands of the co-conspirators, and hostile witnesses thicken the plot"; the converse is not true. The Courts will and do grant summary disposition of antitrust cases against defendants, Associated Press v. United States, 655 Ct. 1416 (1945), Simpson v. Union Oil Co., 84 S. Ct. 1051 (1964), United States v. Northern Pacific Ry. Co., 78 S. Ct. 514 (1958); affirm the exclusion of evidence of justification for group boycotts, Fashion Originators Guild v. FTC, 61 S. Ct. 703 (1941); and order the entry of judgments for antitrust plaintiffs even after defendants have received

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favorable jury verdicts, Albrecht v. Herald Co., 88 S. Ct. 869 (1968) or favorable Court tried decisions, United States v. Container Corp. of America, 89 S. Ct. 510 (1969).

It is respectfully submitted that this Court should direct a verdict in favor of the plaintiffs on the following liability issues:

1. That the defendant attempted to monopolize the sale and distribution of lithiated lemon lime soft drinks to and through the bottlers of Coca-Cola in violation of Section 2 of the Sherman Act (15 USCA § 2);

2. That the defendant contracted, combined, and conspired with bottlers of Coca-Cola to restrain the trade of competing lithiated lemon line soft drink manufacturers to sell and distribute to and through bottlers of Coca-Cola in violation of Section 1 of the Sherman Act (15 USCA § 1);

3. That the defendant contracted, combined, and conspired with bottlers of Coca-Cola to monopolize the sale and distribution of Lithiated lemon lime soft drinks to and through bottlers of Coca-Cola in violation of Section 2 of the Sherman Act (15 USCA § 2); and

4. That the defendant monopolized the sale and distribution of lithiated lemon lime soft drinks to and through bottlers of Coca-Cola in violation of Section 2 of the Sherman Act (15 USCA § 2).

Two important Fifth Circuit decisions enumerate the various elements of antitrust violations. They are North Texas Producers Ass. v. Young, 308 F.2d 235 (5th Cir. 1962) and Woods Exploration & Pro.Co. v. Aluminun Co. of America, 438 F.2d 1286 (5th Cir. 1971). Both deal with the fundamental issues involved in this case; i.e., the use of market position through combination to exclude a competitor from a market.

In North Texas, supra, The Court notes:

> "The Act does not merely guarantee the right to create markets; it also insures the right of entry to old ones . . . . United States v. Tarpon Springs Sponge Exchange, 5th Cir., 142 F.2d 125."

In Woods Exploration, supra, the Court notes:

> "Nevertheless, prior cases have amply demonstrated that conduct designed to barricade access to markets . . . can constitute a proscribed means of monopolization."
>
> . . .
>
> "More important, we do not think that absolute success in excluding competition is an essential

> element to proving monopoly power under Section 2. It is enough that defendants' market position is such that they have substantial power to thwart competition."

It is clear on the record that the defendant has combined with many of the bottlers of Coca-Cola. The combination element both for Section 1 and 2 is established. The remaining question under the charge of combination to monopolize is whether the 86% held by Coca-Cola with its bottlers was intentionally achieved. The North Texas case answers the question:

> "Thus it follows that if monopoly power has been achieved through combination or conspiracy, Section 2 has been violated without further proof. "Intent and purpose to exercise that power" is established by proof of the fact of combination or conspiracy. As a practical matter, it is foolish to combine or conspire without an intent to make use of power resulting therefrom. To hold otherwise would be ridiculous, naive, and impractical."

The power to be exercised is the power to exclude competition. American Tobacco v. United States, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946).

The move by the defendant to exclude all competition for the distribution of lithiated lemon lime soft drink products through the bottlers of Coca-Cola was classic (and undisputed) in design. Where Alcoa in United States v. Aluminum Co. of America, 148 F.2d 416 (1945) anticipated competition and stopped it, Coca-Cola was faced with established competition and eliminated it.

> "It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret "exclusion' as limited to manouvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusianary'. So to limit it would in our judgment, emasculate the Act; would permit

> just such consolidations as it was designed to prevent." (emphasis added).

As the undisputed facts on Exhibit A show, Coca-Cola induced bottlers to combine by, among other things, offering an additional 40¢ per gallon expressly conditioned on combination. (See the facts in Fortner Enterprise v. U. S. Steel Corp. supra,) This is far more substantial than U. S. v. Hamilton Mfg., 1960 Trade Cases Paragraph 69,882 where a manufacturer and its distributors were prohibited from adhering to an understanding that the distributors would refuse to buy from a competitor of the manufacturer. Or, even more analogous, Richfield Oil Co. v. Karseal Corp., 221 F.2d 358 (9th Cir. 1955) where the defendant combined with its dealers to exclude competitive automobile accessories. In this case the combination was organized by Coca-Cola on an invitation and acceptance basis. As the Supreme Court said in Interstate Circuit v. United States, 59 S. Ct. 467 (1939):

> "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that co-operation was essential to successful operation of the plan.
>
> . . .
>
> Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce is sufficient to establish an unlawful conspiracy under the Sherman Act."

The Interstate Circuit case was a circumstantial evidence case. The only inference needed was whether each member of the combination had knowledge of the others participation.

> "It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance." p/ 473.

In the case at bar it has been admitted that agreement to participate in the combination was secured before Coca-Cola would grant the extra allowances.

These combinations throughout the country were unlawful. U. S. v. Hamilton, supra; Klor's v. Broadway--Hale Stores, 3 L. Ed. 2d 741 (1959); Radiant Burners v. Peoples Gas Light & Coke Co., 5 L. Ed. 2d 358 (1961); Associated Press v. U. S., 89 L. Ed. 2013 (1945). That they achieved their intended result of 85% penetration in five years is established fact, though Mr. Law admitted that their additional 2 year free advertising "missed the big ones" - Los Angeles, San Diego, and Minneapolis-St. Paul, all big Bubble-Up accounts whose loss would have totally eliminated Bubble-Up.

Many other acts, themselves unlawful, contributed to Coca-Cola's successful building of a monopoly of the distribution system of the bottlers of Coca-Cola. These are, inter alia, the territory restrictions. It is established that the territories were and are the product of the bottlers, not Coca-Cola, and therefore illegal per se under White Motor Co. v. United States, 9 L. Ed. 2nd 738 (1963) and the cases cited therein. The equipment lending program is a classic antitrust violation. IBM v. U. S., 80 L. Ed. 1085 (1936); International Salt Co. v. United States, 92 L. Ed. 55 (1947).

Even though there were other obvious anti-competitive acts and conduct (especially the initial 3 year losses in the face of additions of one bottler a day for the first 400 days as well as a higher priced product - which raises the clear inference that Coca-Cola bought the market), the undisputed facts compel a directed verdict in favor of the plaintiffs.

II.
Exclusion of Defense Evidence

1. The plaintiffs object to any evidence regarding the availability of other bottlers in addition to Coca-Cola bottlers. Karseal v. Richfield Oil Co., 221 F.2d 358 (9th Cir. 1955); Woods Exploration & Pro. Co. v. Aluminum Co. of America, supra. In Karseal the plaintiff was a manufacturer of car wax. Richfield used coercion and inducements with the Richfield branded gasoline station not to buy competitive automobile accessories not coming from Richfield. Karseal was boycotted from all Richfield stations. The product, although it achieved some penetration, was eventually almost totally eliminated from the independent Richfield service stations. It was obviously no defense for Richfield to argue that Karseal was free to market its product in the many other branded independent service stations. Karseal had the right to compete on the merits for the independent Richfield service stations. Richfield did not have an exclusive right to the independent Richfield stations for allied automotive products the same as Coca-Cola has no exclusive right to the independent Coca-Cola bottlers for allied soft dring products. Therefore, the "arena of competition", see Woods Exploration, supra, must be limited to the independent bottlers of Coca-Cloa; and any evidence that Bubble Up could have gone elsewhere after it was eliminated from the independent Coca-Cola bottler market is totally irrelevant and would do nothing but prolong the trial. (Also see defendant's memorandum, at page 2, in

in opposition to plaintiffs' September Motion to Compel Discovery wherein the defendant concedes the "battle ground" to be the competition between Bubble-Up and Sprite for the independent Coca-Cola bottlers.)

2. The plaintiffs object to any evidence regarding their internal operations unless it can be shown by evidence aluinde that (a) a Coca-Cola bottler knew of such internal Bubble-Up operations and (b) assigned that as a reason for its refusal to deal with the plaintiff. Without such a showing, the evidence would be irrelevant and immaterial. In a major Supreme Court case described by the defendant as "one of those old Supreme Court cases", Eastman Kodak Co. v. Southern Photo Materials Co., 71 L. Ed. 684 (1927) the Supreme Court stated:

> "On the question whether the defendant's refusal to sell its goods to the plaintiff at dealers' discounts was in furtherance of a purpose to monopolize and constituted an actionable wrong, the defendant contends not only that there was no direct evidence as to the purpose of such refusal overcoming the presumption that it was a lawful one, but that such refusal was justified by the fact that the plaintiff had previously undertaken to handle the goods of another manufacturer under a preferential contract. Aside from the plaintiff's contention that this contract related merely to goods that did not conflict with the sale of those which it had been purchasing from the defendant, it was not shown that the defendant knew of this contract when it refused to sell its goods to the plaintiff. And for this reason, if for no other, we think that the trial court rightly declined to charge the jury to the effect that taking over of other goods by the plaintiff in itself justified the defendant in its refusal to sell to the plaintiff."

3. The plaintiffs object to any evidence of the profit and loss of the plaintiffs with its bottlers that it maintained. Plaintiffs'damages only concern those bottlers which were lost by Bubble-Up and the reasonable expectation of those Coca-Cola bottlers who would have bottled Bubble-Up in absence of the defendant's violations. Thus the only damage claim by the plaintiffs is lost profits and loss in value of the business calculated solely on lost sales of lost Coca-Cola bottlers. It makes no difference that the plaintiffs operated with its present bottlers at a loss or profit. The only question is how much more would have been made on sales to lost or foreclosed bottlers of Coca-Cola. If the jury finds that the plaintiffs lost profits and value on lost bottlers because of the defendant's violations, the inquiry stops

there. In the Supreme Court's decision in Chattanooga Foundry v. City of Atlanta, 51 L. Ed. 241 (1906) the Supreme Court quite early announced the principle that a man's total wealth is not in issue on damages in antitrust actions, but only that portion to which the antitrust violation made the man poorer.

> "But when a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there."

This antitrust principle has been consistently observed by the Supreme Court, and has been come to be known as the denial of the passing on defense as a defense to antitrust violations. Hanover Shoe v. United Shoe Machinery, 392 U. S. 481, 88 S. Ct. 2224 (1968). Thus, the plaintiffs' profit or loss on its bottlers that it was able to keep is irrelevant; the only inquiry is how much more the plaintiffs would have made and how much more the value would have been with the lost bottlers reconstituted, Albrecht v. Herald Co., 1971 Trade Cases Paragraph 73, 754; and the reasonable expectation of additional bottlers of Coca-Cola, Cherokee Lab. v. Rotary, 383 F.2d 97 (5th Cir. 1967); Straus v. Victor Talking Machine, 297 F. 791 (1924); Richfield Oil Corp. v. Karseal Corp., after trial, 271 F.2d 709 (1959); Zenith Radio Corp. v. Hazeltine, 395 U. S. 100, 89 S. Ct. 1562 (1969); Woods Exploration & Pro. Co. v. Aluminum, supra; North Texas Producers Assn. v. Metyger, supra.

4. The plaintiffs object to any evidence regarding the affairs of the company under Mr. Key as irrelevant, highly prejudicial, and immaterial. Practically all the lost Coca-Cola bottlers were before 1967. Those bottlers lost after 1967 never gave as reasons for their refusal to deal any of the bad publicity generated by Mr. Key in 1970. There is no possible causal connection between the refusals to deal and Mr. Key, and the effort to offer evidence on this subject is designed simply to show that at least in 1970 the murder victim deserved to be murdered.

5. The plaintiffs object and move to strike all evidence regarding what the plaintiffs may or may not have done with the glass of other competitors as being irrelevant, immaterial, and prejudicial. Perma Life Mufflers v. International Parts Corp., 88 S. Ct. 1981 (1968).

CONCLUSION

For the reasons and authorities given, plaintiffs respectfully move the Court to grant the plaintiffs' motions.

Respectfully submitted,

Joseph M. Alioto

Joseph M. Alioto

JMA/sem

cc. Delivered to Mrs. Gowen and Mrs. Peterson, Saturday, July 1, 1972. JMA.

II.

STATEMENT OF FACTS

The following facts, appearing in the record of this case, are set out in sequential order for the Court as follows:

1. Combination between Coca Cola Bottlers, with the consent of the defendant, to divide markets:
   a. Originally, under the 1899 contract;
   b. Subsequently, upon the introduction of Sprite in 1961.
2. Foreclosure to plaintiff of opportunity to reasonably negotiate the territory in which its product would be distributed by Coca Cola BottlerS.
3. New "Investment Market" territories organized by the defendant upon the introduction of Sprite in 1961.
4. Group Bottler meetings held by the defendant to explain the outline and function of the new territories:
   a. Combine the financial strength of the defendant and a group of Bottlers within a designated new territory to advertise, promote and merchandise the defendant's product Sprite on the consumer level (Bottlers within the territory would act as a "unit") while avoiding product and price competition amongst the Bottlers in the group.
   b. Employ the dominant position of Coca Cola in the cold bottle market to introduce Sprite in that segment of the consumer market and to arrive at three year anticipated gallonage figures for Sprite.

   c. Investment market (new territory) was premised upon fact of combination and was invoked by:
      1. decision made in Atlanta to have all the Company owned bottling subsidiaries introduce Sprite in April of 1961 (four of bottling subsidiaries are in the top twelve soft drink per capita areas of the United States)
      2. decision made to approach and attempt to franchise largest (key) Bottler in new "Investment Market" territories
      3. decision made to use television as primary advertising medium for introduction of Sprite in new territory
      4. decision made to make an additional 20¢ per anticipated gallon Sprite, projected over a three year period (available, when added to the contractual 25¢ per gallon on a 60¢ 1st year, 40¢ 2nd year, and 20¢ 3rd year basis), expressly conditioned upon a combination of Bottlers located within the new territory the effect of which would be roughly 80% consumer distribution within the new territory.

Bottlers introducing Sprite after the above-described combination was effected would not have the extra 20¢ per anticipated gallon of Sprite made available to them, and would have, absent the combination, 25¢ instead of 65¢ per anticipated gallon of Sprite for the first Introductory year.

5. Department of Bottler consolidations and mergers created in 1962.
6. Defendant sustains consistently increasing losses on Sprite under the Investment Marketing Program (1961-1963).
7. Defendant begins to appoint Bottlers as wholesalers of post-mix fountain syrup for Sprite and all products (1962)

7(a). Appointment of Bottler as wholesaler for all fountain syrup, i.e., Coca Cola, Sprite, TAB and Fanta conditioned upon having Sprite on sale in bottles (Dickson Aff.; McGuyer No. 9).

8. Defendant begins its Equipment Lending Program under which it placed free fountain dispensing equipment in retail outlets on a nationwide basis with the contractual provision that, with the exception of one optional spout, all the products of the Coca Cola Company must be sold through the equipment, including Coca Cola, Sprite, TAB and Fanta flavors.
9. Bottler combinations formed by Investment Market Program become "accepted" by Bottlers (1964).
10. 1964 Coca Cola Program offered to Bottlers by defendant which provided for a cash payment of 2-1/2¢ per increased (over 1963) gallon of Coca Cola Bottle or BX (pre-mix) syrup purchased by the Bottler such payment to be made upon the condition that the Bottler "aggresively market" Sprite.

10(a). (Total amount of cash bonus 18¢ Coca Cola, 2-1/2¢ Sprite, 2-1/2¢ TAB, 2-1/2¢ Fanta = 25-1/2¢ expressly conditioned on participation in Coca Cola Co-op)

11. Defendant replaces Investment Markets with Bottler combinations called "Co-ops" (1964).

12. Mergers and Consolidations of Bottlers continue within the territories designated by defendant.
13. 1964-1965 programs initiated under which Company would pay entire Sprite advertising cost (the Bottler would not pay his 50% normal share) for two years. Offer conditioned on:
    a. Placement of Sprite in 2/3 to a majority of the Coca Cola outlets;
    b. Participation in the following year's Bottlers' Co-op.
14. Monies or value made available to Coca Cola Bottlers for Sprite:
    1.) All Fanta money;
    2.) Sprite contract money 25¢;
    3.) Sprite Investment market money 20¢;
    4.) Coca Cola gallonage increase money;
    5.) Amounts spent by Fountain Sales Dept. in placing fountain dispensers for sale of Sprite syrup;
    6.) Value of advertising spent on Coca Cola with which Sprite was specifically identified;
    7.) Value of television and other media discounts given to Bottlers because of joint advertising;
    8.) Value of entire Coca Cola Bottler field force;
    9.) Value of Coca Cola Market research;
    10.) Value of Coca Cola management;
    11.) Value of Coca Cola Quality Control Dept.;
    12.) Value of Coca Cola Advertising Dept.

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It is indisputable on the record before this Court that the Coca Cola Bottlers are a unique distribution market and are considered as such by the soft drink industry generally. The testimony of Messrs. Richard Harvey, Ben Koch, Irvin Sulmeyer, Richard Ryan, to name a few of the witnesses who have testified to this point, has all been to the effect that the Coca Cola Bottlers, considered as a group for purposes of national distribution are without peer in the industry.

Further, the testimony of Carl Navarre demonstrates that businesses other than concentrate manufacturers who deal in the soft drink industry treat the Coca Cola Bottlers as a distinct market, e.g., the Navarre Corporation and Cavalier Corporation (both of which sell vending and other assorted equipment exclusively to Coca Cola Bottlers).

With respect to this "competitive arena" in which the defendant and plaintiff exerted themselves to gain national distribution for their respective lemon-lime products the following chronology is set forth:

- 1958-59 corporate decision by plaintiff to deal exclusively with Coca Cola Bottlers as a distribution market in an effort to obtain national distribution.

- 1960 activities of the defendant informing Coca Cola Bottlers of plaintiff's dealings with some Pepsi Cola Bottlers.

- Bubble Up franchises approximately 340 Coca Cola Bottlers.

  Renewed commitment by plaintiff to deal only with Coca Cola Bottlers as a distribution market.

- 1961 decision by Fanta Beverage Company to deal only with Coca Cola Bottlers as a distribution market.

- Plaintiff viewed, in 1961, as being most active competition for Coca Cola Bottlers as a distribution market.

- 1961 "goal" set by Fanta Beverage Company to achieve 80% national distribution through Coca Cola Bottlers in five years.

- 1961 "goal of 80% reached in 1965. (86% of Coca Cola Bottlers distribute Sprite: 1967).

- Plaintiff lost approximately 300 Coca Cola Bottlers.

(Attached and made a part of this Exhibit are certain portions of the testimony of Messers. Harvey and Stoddard.)

you note when you are tempted, and that is the Coca-Cola bottlers, are tempted to broaden your line beyond the products offered you by the company, ask yourself if you really are buying or if you are really being bought. By that I take it that you mean that anytime that any bottler might be tempted by his judgment that he ought to have another line, that is not a product of the Coca-Cola Company, you are askinghim to reflect on that just a minute before he makes such a decision?

A The average Coca-Cola bottler represents a bastion of financial strength to his community, and he has a different business --

Q Excuse me, a little louder, Mr. Harvey?

A The average Coca-Cola bottler represents a bastion of financial strength in his community. The average Coca-Cola bottler here has a different business

Richard Harvey

from most of his competitors. The average independent bottler has a tremendous business where he sales bottles through fountain dispensers, through pre-mix and post-mix dispensers. Generally, the average Coca-Cola bottler has more of an on-premise business than his competitors do. One of the first things that any bottler does in adding a new product is to put it in his cold drink market, to put it in vending machine, to put it in his on-premise sales. . . .

Q Among those different assets that you mentioned that a Coca-Cola bottler has, you mentioned name, you mentioned organizational ability, you mentioned the bottler's access to finance. What does that mean? I take it that these distinguish the Coca-Cola bottler from other bottlers?

A Yes, sir, they do.

Harvey 129
129

Q All right.

Now, Mr. Harvey, did you in your speech which we have just gone over, either in substance or effect, intend to convey to the bottlers that it was the policy of The Coca-Cola Company to provide a steady stream of new products to fill volume or profit needs of bottlers, the flow of proven new products was to be an ongoing effort by Coca-Cola, USA to discourage others' attempts at courting Coca-Cola bottlers, was that your intention when you delivered that speech?

A I think the speech ought to be able to speak for itself, sir. It was carefully put together to try to be a clear communications document. . . .

Q And would it be correct that the policy of the company was to have a flow of new products in an on going effort to discourage others who might attempt to court Coca-Cola bottlers?

A The company has been engaged in developing and trying to develop additional new soft drink product since 1960, and it is an ongoing activity. (Emphasis Supplie

CALVIN C.
STODDARD

Q All right. Did you have any discussions with Mr. Dickson about the number of Coca-Cola bottlers who had Bubble Up?

A I assume we did; yes.

Q What did you talk about, in sum and substance, not word for word, but basically what did you talk about?

A About the fact that these bottlers were in Bubble Up.

Q Did you discuss with Mr. Dickson possible programs that could be instituted to change these

CALVIN C
STODDARD

bottlers from Bubble Up to a Coca-Cola product?

A We were selling Sprite.

Q Yes.

Did you discuss with Mr. Dickson a program or a plan to have these bottlers change from Bubble Up to Sprite?

A We tried to sell Sprite wherever we could.

Q I understand that, sir, but did you discuss with Mr. Dickson a plan or a program to convert these bottlers from Bubble Up to Sprite?

A If a bottler was not handling Sprite, we tried to sell him Sprite.

Q I understand, Mr. Stoddard, you did try to sell him on Sprite.

But my question is: Did you discuss with Mr. Dickson any plan or program to convert Coca-Cola bottlers from Bubble Up to Sprite?

A We had a plan to get bottlers into Sprite. It was the same regardless of whether they were --

THE COURT: He asked you a specific question. If you will answer that, and then you may explain. I believe the question was: Did you discuss with Mr. Dickson any specific plan to convert bottlers of Bubble Up to Sprite.

THE WITNESS: We tried to sell everyone that

THE COURT: That is not the answer. You may answer the question and explain your answer if you desire to do so. That was his question. Would you please answer that, first?

THE WITNESS: Yes.

BY MR. ALIOTO:

Q Yes, you did?

A Yes.

Q Did you request Mr. Dickson to send you the list of the different bottlers throughout the country who were bottling Bubble Up?

A Not to my knowledge, I didn't.

Q Did you use this document, Plaintiff's Exhibit 184 in evidence, in any discussion you had with Mr. Dickson about converting Bubble Up bottlers to Sprite?

A In correspondence I think so; yes.

Q Did you ever have any sit-down meetings with

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